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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

AND

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Linden Lumber Division, Summer & Co. (herein "Linden" or "the Company") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 13, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. A1-A26) is not yet officially reported.[1] The decision and order of the National Labor Relations Board (App. F, pp. 33-51) is reported at 190 NLRB No. 116.

JURISDICTION

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit (App. A and B, pp. A1-A27), reversing and remanding the order of the National Labor Relations Board, both issued on September 13, 1973. Thereafter, Linden moved to intervene in the proceeding[2] and to enlarge the time for filing a petition for rehearing. The Court granted these motions "in order that it [Linden] may have standing to seek rehearing and possibly certiorari . . ." (App. C, p. A30). Linden's timely motion for rehearing *en banc* was denied on November 6, 1973 (App. D, p. 31). Thereafter Linden, as well as the National Labor Relations Board and the petitioning unions below, each moved this Court for orders extending the time for filing respective petitions for writs of certiorari to February 10, 1974, which the Chief Justice granted in the instant case on December 20, 1973. (App. E, p. A32). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

1. In the court below this case was styled *Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America* v. *National Labor Relations Board*, No. 71-1529, and was consolidated with No. 72-1794, *Textile Workers Union of America* v. *National Labor Relations Board*.

2. Linden had been the respondent before the Board in No. 71-1529. Wilder Manufacturing Company, the respondent before the Board in No. 72-1794, did not participate in the Court of Appeals.

QUESTION PRESENTED

May an employer lawfully refuse to bargain with a union asserting to represent its employees where the union's majority status has not been established through the National Labor Relations Board's election processes and the employer has not interfered with such processes so as to preclude a fair election?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151, *et seq.* ("the Act") are set forth in Appendix I at pp. A91-A92.

STATEMENT OF THE CASE

This case presents a question, critical to the administration of the National Labor Relations Act, which was expressly left undecided by this Court in *N. L. R. B.* v. *Gissel Packing Company*, 395 U. S. 575, 595 n. 18 (1969), i.e., whether a compulsory bargaining order may be forced upon an employer who rejects a union's card-based bargaining demand ". . . and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices that would tend to disturb the 'laboratory conditions' of that election." This issue is presented to the Court upon an undisputed factual record.

Having obtained authorization cards from a majority of the Company's employees in an appropriate bargaining unit, the Union[3] demanded by letter dated January 3, 1967[4] that it

3. Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

4. All dates hereafter refer to the year 1967 unless otherwise noted.

be recognized as the collective bargaining representative of these employees. On January 5, the Company responded by letter, stating that it doubted the Union's claimed majority status and suggesting that the Union petition the Board for an election. On January 6, the Union filed such a petition. In ensuing discussions to establish the details for an election, Linden declined to enter a consent election agreement or abide by the results of an election on the ground that the Union's organizational campaign had been improperly assisted by Company supervisors. The Company did, however, offer to enter into a consent agreement with the Union if it would submit a "fresh" showing of interest untainted by supervisory participation.

The Union voluntarily withdrew its election petition on February 3 and, on February 6, presented the Company with a renewed bargaining demand accompanied by an employee statement, prepared at a Union meeting attended by the very employees whose supervisory status was in dispute, reaffirming support for the Union. The Company declined this demand by letter dated February 8, asserting that the Union's purported membership was still improperly influenced by supervisors and that, in any event, as Linden had previously urged, the Union should prove its claim in a Board election. The Union, however, continued to spurn the Board's election processes and, instead, struck for recognition on February 15, 1967—a disruption to industrial peace which continued until June 1. Shortly after commencement of the strike, the Union filed the instant refusal to bargain charges against Linden. It is undisputed that the Company committed no unfair labor practices which interfered with the election atmosphere or otherwise precluded a fair election.[5]

5. At the conclusion of the strike, the Company refused to reinstate two employees it had contended were supervisors and, hence, unprotected by the Act. The Board found this to be an unfair labor practice; the Company thereupon reinstated the two employees and this issue was not presented to the court below.

The Board concluded that Linden ". . . should not be found guilty of a violation of Section 8(a)(5) [of the Act] solely on the basis of its refusal to accept evidence of majority status other than the results of a Board election." In reaching this conclusion, the Board expressly declined "to reenter the 'good faith' thicket . . . which we announced to the Supreme Court in *Gissel* we had 'virtually abandoned . . . altogether' . . ." (App. F, p. 41). In the Board's view, bargaining orders, in the absence of election interference, would be appropriate only where, in contrast to the present case, the Union's majority status had been proven by a "mutually acceptable and legally permissible means" (App. F, pp. A41-A42).

On petition for review, the Court of Appeals reversed. It noted that the present question had been left undecided in *Gissel* and that, in its opinion, the position adopted by the Board was "inconsistent with the Act." (App. A, pp. A13, n. 25 and A26). The Court, contrary to the Board, declared that an employer faced with a demonstration of union majority support cannot merely refrain from the commission of election interference; that a company confronted by such a situation must affirmatively "evidence good faith" and "resolve the possibility [of majority status] through a petition for an election." (App. A, p. A23). The Court remanded to the Board "to reconsider, what option, consistent with the statute, it wishes to follow." (App. A, p. A26).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents an Issue of Critical Importance in the Administration of the National Labor Relations Act Which Was Expressly Left Unanswered by This Court in Gissel

As this Court recognized in *Gissel*, the duty of an employer to recognize a union that predicates its recognition claim on asserted evidence of majority status other than the result of a valid Board election presents a significant question in the administration of the Act. *Gissel* partially resolved that issue by setting forth the controlling standards where the "preferred route" (395 U. S. at 602) of an election was precluded by employer unfair labor practices. Although *Gissel* did not criticize the Board's approach, announced at the oral argument of that case and followed in this case—that "the key to the issuance of bargaining order is the commission of serious unfair labor practices" and that an employer "can demand an election with a simple 'no comment' to the union" (395 U. S. at 594-595)—the Court expressly left undecided the question of "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes" (395 U. S. at 595 and n. 18). That unanswered question is presented here.

Guidance by this Court as to the resolution of this significant, recurring problem is warranted. The Board in this case has articulated one rule to govern the propriety of bargaining orders in such a situation and the Court of Appeals another, far-different test. Since petitions for review may be filed in the District of Columbia Circuit under Section 10(f) of the Act by any person aggrieved by a final order of the Board, without limitations of venue, the disagreement between the

Board and the court below will necessarily result in a substantial dislocation in the national labor policy. Cf., e.g., *N. L. R. B.* v. *Meat Cutters Local 347, Food Store Employees Union*, 476 F. 2d 546 (D. C. Cir. 1973), *cert. granted*, No. 73-370 (Dec. 3, 1973);[6] and *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, ... F. 2d ..... (D. C. Cir. 1973), *cert. granted*, Nos. 73-556 and 595 (Jan. 21, 1974). This dislocation is particularly disturbing since it may arise, or at least influence, every union recognitional demand. This Court should, by granting this petition and the petitions that the Board and Union have indicated they intend to file herein, remove this undesirable impediment to the orderly administration of the Act.

2. The Decision Below Is Inconsistent with Gissel and the Act Itself

The entire thrust of *Gissel* is to affirm the inapplicability of any inquiry into an employer's subjective motivation in assessing the propriety of a bargaining order.[7] The decision below, however, now resurrects the very "good faith doubt" test which

6. Unlike *Food Store Employees*, where the central issue concerned the extent of a reviewing court's remedial authority *vis-a-vis* that of the Board (see brief of the Board in No. 73-370, pp. 2, 10, 12-15, 27-29), this case involves an irreconcilable disagreement between the Board and the Court of Appeals over the interpretation of one of the Act's fundamental provisions.

7. For example, in disarming the asserted dilemma that employers would violate the Act by investigating a union's claimed majority support, or if they failed to undertake such an investigation, be accused of a lack of a "good faith doubt" of a claimed majority status, this Court reiterated:

> As we have pointed out, however, an employer is not obligated to accept a card check as proof of majority status, under the Board's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status. [395 U. S. at 609].

Gissel had presumably finally laid to rest.[8] It adopts, in effect, the union position in *Gissel*, that "an employer, when confronted with a card-based bargaining demand, can insist on an election only by filing the election petition himself . . . and not by insisting that the Union file the election petition", which this Court expressly left undecided. 395 U. S. at 594-595.[9]

Imposing upon employers an affirmative obligation, of either filing an election petition, or otherwise making an affirmative showing of the reasons for entertaining a doubt as to a union's asserted majority status, also directly conflicts with several basic policies of the Act:

> *First*, Section 9(c)(1)(B) of the Act merely *permits* an employer to file an election petition; it in no way *requires* that a petition be filed in order "to test . . . good

8. The demise of the "good faith doubt" test came as no surprise by the time *Gissel* was decided. It was heralded in *Aaron Brothers*, 158 NLRB 1077 (1966), where the Board shifted the burden of proving an employer's bad faith to the General Counsel In effect, an employer who did not commit any pre-election unfair labor practices was assumed not to have acted in bad faith, and, hence, no bargaining order issued. As it became plainly obvious that "good faith doubt" was mere rubric, and that the real inquiry was whether utilization of the election process was tainted by employer unfair labor practices, criticism of the "good faith doubt" standard mounted. See, e.g., *N. L. R. B.* v. *River Togs, Inc.*, 382 F. 2d 198, 206-208 (2nd Cir 1967). And finally, in *Gissel*, the doctrine was "abandoned . . . altogether." 395 U. S. at 594. See also *General Steel Products, Inc.* v. *N. L. R. B.*, 445 F. 2d 1350 (4th Cir. 1971), and the Board's decision on remand, 199 NLRB No. 121 (1972).

9. Indeed, *Gissel* expressly contemplated "category III" situations, i.e., cases involving "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order" (395 U. S. at 615). Anomalously, under the lower court's decision, the employer who commits no unfair labor practice is apparently *more* vulnerable to a bargaining order than is the employer who commits such "category III" unfair labor practices. Further, the unreliability of authorization cards as the basis for recognition in a third category situation is surely a subject of even more concern where, as here, there are no election-polluting unfair labor practices.

> faith" (App. A, p. 26). In fact, by conditioning the filing of an employer petition on a prior request to bargain, Section 9(c)(1)(B) sought to insure that employers would not prematurely force an election during the nascent stages of a union organizational campaign and thus pretermit that campaign.[10] The policies underlying Section 9(c)(1)(B), accordingly, "fully support", rather than negate, the Board policy of permitting an employer to "insist on a secret ballot election, unless . . . he engages in contemporaneous unfair labor practices likely to . . . seriously impede the election." *Gissel*, 395 U. S. at 599-600.
>
> *Second*, an employer's right under Section 8(c) of the Act and the First Amendment "to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *Gissel*, 395 U. S. at 615. It was, in fact, this desire to permit a full exposure of opposing views that, at least in part, motivated the Board to "no longer require . . . an employer to show affirmative reasons for insisting on an election . . ." *Ibid.* To force an employer to petition for an election, however, as the decision below would do, while a union is at the pinnacle of its strength after a long and frequently clandestine one-side organizational drive, or during a coercive recognitional strike, would effectively vitiate this right of free speech.
>
> *Third*, forcing an employer to petition for election also frees a union seeking recognition from two requirements otherwise imposed by the Act. Under Section 9(c)(1)(A), union-filed petitions must have a valid and sufficient showing of employee interest to warrant further proceedings. See *Gissel*, 395 U. S. at 607. An employer petition, on the other hand, need not be supported by any interest showing and may, as a result, indirectly cure

10. See, e.g., Senate Report No. 105, pp. 11, 25 (1947), I Leg. Hist. of the Labor Management Relations Act ("I Leg. Hist."), pp. 417, 431; and House Report No. 245, 80th Cong. 1st Sess., 35, 93 Cong. Rec. 3954 (1947), I Leg. Hist., p. 326.

any defects, such as the supervisory participation in card solicitation in the instant case, which would preclude the union from filing a proper petition. Additionally, a mandatory petition obligation also places the employer at a substantial tactical disadvantage; he must both initially select the appropriate bargaining unit and establish an election date prior to exercising his "legal right . . . to try to persuade [his] employees, including those who had signed cards, to disavow the union". *N. L. R. B.* v. *Drives, Incorporated*, 440 F. 2d 354, 364 (7th Cir. 1971).

And finally, the decision below, contrary to the Congressional intent evidenced by Section 8(b)(7) of the Act, encourages union recognitional strikes. The Court of Appeals thus indicated that while a recognitional strike standing alone does not necessarily constitute "convincing evidence of majority support," it nevertheless creates, even in the absence of a union card majority, "sufficient probability of majority support as to require an employer asserting a doubted majority status to resolve the possibility through a petition for an election . . ." (App. A, p. A23).

The decision below, in sum, would significantly alter, admittedly without a "clear cut" directive "in either the text of the statute or the legislative history" (App. A, p. A14), the present policies and structure of the Act. Review by this Court to determine the propriety of these alterations is, therefore, necessary.

CONCLUSION

For the foregoing reasons, Linden Lumber Division, Summer & Co., respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 71-1529

TRUCK DRIVERS UNION LOCAL NO. 413, ETC., ET AL.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD.

No. 72-1794

TEXTILE WORKERS UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondents.

Petitions for Review of Orders of
the National Labor Relations Board

Decided September 13, 1973

Laurence Gold for petitioners. *Sidney Dickstein* and *Thomas F. Phalen, Jr.* were on the brief for petitioner in No. 71-1529.

Patricia Eames, J. Albert Woll and *Thomas E. Harris* were on the brief for petitioner in No. 72-1794.

Stanley R. Zirkin, Attorney, National Labor Relations Board with whom *Marcel Mallet-Prevost,* Assistant General Counsel at the time the brief was filed, and *Robert A. Giannasi,* Attorney, National Labor Relations Board were on the brief, for respondent.

Before: LEVENTHAL and ROBB, *Circuit Judges* and JAMESON,* *Senior United States District Judge* for the District of Montana.

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge:* These consolidated appeals raise the question of the scope of an employer's duty to bargain, under Section 8(a)(5) of the National Labor Relations Act, on the basis of authorization cards obtained by the union, in light of NLRB v. Gissel Packing Co., 395 U. S. 575 (1969). The cases require review of two orders of the National Labor Relations Board. The factual settings are closely related. We shall set out the background in each case before considering the pertinent legal principles.[1]

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* Sitting by designation pursuant to 28 U. S. C. § 294(d).

1. No. 71-1529 is before the court on petition of Truck Drivers Union Local No. 413 (Truck Drivers) affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, to set aside a Board decision refusing to order Linden Lumber Division, Summer & Co., ("Linden") to bargain with the union, 190 NLRB No. 116, June 7, 1971.

No. 72-1794 is before the court on petition of Textile Workers Union of America to review the Board's Second Supplemental Decision and Order, refusing to issue a bargaining order directed against Wilder Manufacturing Co., August 21, 1972, reported at 198 NLRB No. 123.

All parties agree that the Board's finding of facts are supported by substantial evidence. Accordingly, we rely for our statement of facts on the decisions of the Board, 173 NLRB No. 30 (1968), 185 NLRB No. 76 (1970), (Wilder); 190 NLRB No. 116 (Linden Lumber Division, Summer & Co.), and the trial examiner's decisions as adopted.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. *Wilder Manufacturing Co.*

On the morning of October 12, 1965, representatives of the Textile Workers presented Walter Derse, secretary and general manager of Wilder, with 11 signed and two unsigned union membership cards[2] and requested recognition as bargaining agent of the Company's production and maintenance employees. Of the 30 employees then on the Company's payroll, 18 were in the production and maintenance unit, which the Board found to be appropriate for purposes of collective bargaining.[3] Failing to receive an immediate answer to the request, the eleven employees who had signed the authorization cards left the plant and established a picket line. They were joined the

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2. The cards were signed at the home of William Hissam, a representative of the Union, on the evening of October 11. The card contained the following language:

> "I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said [Union] as my representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment." (JA at 11.)

3. In the amended complaint, the General Counsel alleged that the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is "All production and maintenance employees of Respondents, employed at its Port Jarvis plant, exclusive of draftsmen, office clericals, plant clericals, guards, watchmen, professional employees and all supervisors as defined in Section 2(11) of the Act." (JA at 12.)

By consent of all parties 18 employees were included in a unit of production and maintenance employees. The General Counsel and the company disagreed as to whether seven additional employees should be included in that unit. The Trial Examiner found that two of the contested employees were supervisors, and that the other five employees lacked "a community interest" with the production and maintenance employees. (JA at 12-17).

next day by the two employees whose blank cards were among the thirteen presented to Derse.[4]

During the evening of the next day, October 13, the Company's officers met. Walter Derse reported that there were ten or eleven employees on the picket line and as "we are about 30 (not including the officers of the Company) it appears that they do not represent a majority." The officers decided not to recognize the union.[5] The picketing continued for at least five months thereafter. Subsequent demands for recognition were made without response from the Company.

On May 9, 1966, the Board's General Counsel filed a complaint charging Wilder with violations of § 8(a)(1) and (5) of the Act.[6] The Trial Examiner, on September 22, 1966, upheld the complaint on the § 8(a)(5) and dismissed the 8(a)(1) charge.[7] The Board, however, concluded that the 8(a)(5)

4. As the Trial Examiner noted, as the company's proposed unit was 25 employees, "it is apparent that the Union on October 12, 1965, held valid authorization cards (13 in number) for the majority of the employees in such unit."

5. As reported by the Trial Examiner, Derse included all the employees in the thirty

> "because . . . what Mr. Cohen [a union representative] told me was that they represented a majority of our employees." . . . [T]he Trial Examiner has found that the Union requested representation in a production and maintenance unit thus there was no basis for Derse's assertion that the Union desired to represent all thirty employees. Moreover, the Trial Examiner is not convinced that Derse was so unschooled in labor matters as to believe that the Union was seeking to represent Plant Manager Mr. Carlin, Supervisor DeGraw, or the office clerical employees whom the employer conceded should be excluded from the appropriate unit. Furthermore at the time Derse's remarks were claimed to have been made, he was aware that only production and maintenance employees had joined the strike. (JA at 19 n. 35).

6. As to the 8(a)(1) charge, the complaint alleged that certain statements by a supervisor violated the § 7 rights of Wilder employees. This unfair labor practice charge is not before the court.

7. The designation of the valid 8(a)(1) charge was only in connection with the failure to bargain under 8(a)(5), thus not constituting an independent unfair labor practice.

charge should be dismissed since "there is no showing whatsoever that Respondent had rejected the collective-bargaining principle or engaged in any interference, restraint, or coercion of employees to undermine the Union. Nor does the record show that Respondent has engaged in any other conduct which would prevent the holding of a fair election."[8] On petition for review to this court, we held per curiam, 137 U. S. App. D. C. 67, 420 F. 2d 635 (Nov. 14, 1969), that in light of the intervening *Gissel* decision, *supra*, and possible conflicts between the "current practice" of the Board, as represented to the Supreme Court, and the decision reached, the case should be remanded for "further consideration by the Board in the first instance in light of *Gissel*, but without limitation."[9]

On August 27, 1970, 185 NLRB 175, the Board issued a Supplemental Decision and Order, after a review of the entire record, and now found that Wilder's course of conduct did constitute a violation of § 8(a)(5). In reaching this result the Board declined to rest on a finding that the case presented an employer who refused to bargain and "stands upon his doubt

8. In so holding the Board acknowledged that proof of "bad faith" would be a basis of a valid 8(a)(5) violation, but equated this with evidence that the "Employer has completely rejected the collective-bargaining principle or seeks to gain time within which to unlawfully undermine the Union and dissipate its majority." (J. A. at 6).

9. 137 U. S. App. D. C. at 68, 420 F. 2d at 636. The court noted specifically that the defense advanced by the employer, that it did not think the cards presented to it represented a majority of the appropriate unit, seemed inconsistent with the Board's position in *Gissel*, where the Board represented to the Court at oral argument that "an employer could not refuse recognition initially because of questions as to the appropriateness of the unit." 395 U. S. at 594. Judge Fahy, concurring separately in the per curiam, stated (137 U. S. App. D. C. at 70, 420 F. 2d at 638):

> The present record reveals that the Union representatives had authorization cards free of suspicion from a majority in a unit recognized as appropriate by the trial examiner and the Board, followed by evidence of the majority's solidarity through the picketing and strike. Moreover, the employer did not demand that the Union request a Board election.

as to the appropriateness of the unit," stating that "the Respondents' response—or lack of response—to the Union demand did not assert this as the ground of the refusal . . . ."[10] Instead the Board focused on these findings: (1) There was evidence, in addition to mere cards, sufficient to communicate to the employer convincing knowledge of majority status (the independent knowledge test). (2) The evidence was insufficient to show that the employer's refusal to grant recognition was based upon genuine willingness to resolve any doubts concerning majority status through the Board's election process. On finding both these conditions met, the Board concluded that the refusal to bargain constituted a violation of 8(a)(5).[11] The Board then

10. The Board, in note 4 of its supplemental decision, stated:

> "The Respondents did later contend before this Board that certain additional employees should be added to the Union's proposed unit. We have, however, in other cases been required to resolve such unit questions in 8(a)(5) cases and, upon making a finding of appropriate unit, then proceeded to direct the respondent to bargain in the unit ultimately found appropriate. . . . Generally, of course, any such doubts are best resolved in the course of representation case procedures which any party is free to invoke. As we note *infra*, the Respondents here made no attempt to resolve any doubts as to appropriateness of unit by this method." (JA 34).

11. The Board attributed "independent knowledge" to the employer on the basis of (a) 11 of 18 production and maintenance employees had signed cards, (b) all of the card signers went on strike, and (c) "an officer of the Respondent conceded in his testimony that he told his fellow officers that the Union 'had 10 or 11' of the employees." (JA at 35).

As to the second condition, the Board noted that "the Employer did not itself file an election petition or urge or even suggest to the employees or the Union the use of such procedures." (JA at 35). Also the Board rejected Respondent's contention that the provisions of 8(b)(7)(c) supported its position that an election was required because picketing for recognition is unlawful if "conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing." The Board relied on Blinne Construction Company, 135 NLRB 1153 (1962) as rejecting that construction of the statute where a union strikes and pickets against an employer's unlawful refusal to recognize it and meritorious 8(a)(5) charges have been filed. (JA 37).

filed an application for enforcement of its supplemental order in this court on September 21, 1970. While the petition was pending, the Company moved to dismiss this petition on jurisdictional grounds, and subsequently the Board moved to have the case remanded to it for reconsideration in light of its decision in *Linden Lumber*, 190 NLRB No. 116, 77 LRRM 1305 which issued on June 7, 1971 and is the companion case in this litigation. Our court upheld the jurisdictional objections of the company and transferred the case to the Second Circuit,[12] which on February 1, 1972, remanded to the Board for the requested reconsideration.[13]

The Board on August 21, 1972, 198 NLRB No. 123, then issued its Second Supplemental Decision and Order in *Wilder* which reversed the First Supplemental Decision and Order. The Board, one member dissenting, rejected the "independent knowledge" test and held that absent voluntary measures by the employer, through an attempt[14] or agreement[15] to determine majority status by any means other than a Board election, and in the absence of any independent unfair labor practices, the predicate could not be established for an 8(a)(5) violation.[16]

12. . . . . U. S. App. D. C. . . . . , 454 F. 2d 595 (1971).

13. JA at 104.

14. Citing Nation-wide Plastics, 197 NLRB No. 136 (1972).

15. Citing Snow & Sons, 134 NLRB 709, enf'd 308 F. 2d 687 (9th Cir. 1962).

16. The Board was of the view that no workable standard could be developed to evaluate whether an employer "knows" or "doubts" majority status, nor would it determine the "willingness" of the employer to have majority status determined by the election process. Moreover, the Board emphasized the "preferred status" of the election process. It concluded:

> We think it far better, by making clear here, as we did in *Linden*, that the proper course in such cases is for the union, on behalf of the employees, to invoke our election processes. In that manner, if there is indeed majority support, it will be evidenced in clear and unmistakable fashion within a matter of a few weeks. Surely this is a far better basis for the bargaining relationship than a decision in litigation which would take us nearly a year to reach and which, even then, may be subject to debate as to the soundness of its evidentiary base and to further contest in the courts. (JA at 110).

After over 7 years, and three Board decisions representing a series of reversals in position, the Board now seeks to limit sharply the scope of any duty to bargain on the basis of authorization cards.

B. *Linden Lumber*

The procedural history of *Linden Lumber* is shorter—there is only one Board decision—but pointed, for it is on the basis of the Board's decision in this case, issued June 7, 1971, that the decision in *Wilder* rests. The time elapsed since the underlying events, however, is more than six years.

On December 28, 1966, employee Martin contacted Local 413 representative Dow Norman about organizing the employees of Linden Lumber (the Company). Next day, Norman held a meeting during which 12 employees, including 2 alleged supervisors, Shafer and Marsh, signed authorization cards. In the proceeding before the Trial Examiner, "the parties stipulated that at all times material there were 10 employees" within the appropriate bargaining unit.[17] On January 5, 1967, Local 413 ("the Union") sent a letter to the Company requesting recognition. On February 3, at a prehearing conference on the Local's representation petition, the Company declined the Union's request to enter a consent election agreement. Instead the Company raised threshold questions as to the Union's showing of

17. There was agreement that the following unit was appropriate within the meaning of Section 9(b) of the Act:

> All truck drivers, warehousemen, production and maintenance employees and yardmen . . . excluding office clerical employees, guards and supervisors. (JA at 73).

Initially there was a dispute over the inclusion of three alleged supervisors in the unit, but the parties agreed that one, a Mr. Toops, was a supervisor. As to Marsh, the trial examiner found he was not a supervisor. Since Shafer resigned on February 6, 1965, the Trial Examiner determined it was unnecessary to decide whether he was, in fact, a supervisor. (JA at 73-74).

Thus, the Examiner determined there were 11 legitimate employees in the actual unit. Eliminating the vote of Shafer, every member of the appropriate unit signed an authorization card.

interest, on the basis that the union had been organized by supervisors (Marsh and Shafer).[18] Based upon the Company's alleged fear of recognizing a supervisor-dominated union, the Company stated that unless it could settle the 8(a)(2) violation in the context of the petition for an election—a request refused by the hearing officer—it would refuse to recognize the union, even after a Board-conducted election.[19] Immediately after this statement by the representative of the Company (Mr. Rector), the Union's representatives withdrew the representation petition.[20] After the withdrawal was approved, Rector told Mr. Smedstad, the Union attorney, that if the Union submitted a new petition supported by a "fresh" 30 percent showing of interest, the Company would go to a consent election. By March 4, the Union had obtained 9 signatures (leaving out the alleged supervisors, Shafer and Marsh). The Company still refused to recognize the Union "because its membership included supervisors who influenced employees," again raising the spectre of the 8(a)(2) violation.

On February 15, the employees struck in support of the Union demand for recognition.[21] The Union filed its charge of refusal

18. The employer had reference to a possible 8(a)(2) violation which prescribes employer domination of unions.

19. The Hearing Officer ruled that Linden's claim of supervisory influence in organization of Local 413 related to the Union's administrative showing of interest (Board Rule 101.18) and could not be litigated at a representation hearing. (See JA at 46).

The Trial Examiner subsequently found, in the hearing on the 8(a)(5) charge, that in fact there were no supervisors in the bargaining unit.

20. The Trial Examiner found, on the basis of cross-examination of the union's counsel, that this was done to avoid two years of litigation. The sequence, of course, would be the order of an election; if the union wins, the employer resists recognition; the General Counsel brings an 8(a)(5) violation. The union sought to short-circuit this proceeding by moving directly to an 8(a)(5) proceeding, a strategy facilitated by the complaint of the General Counsel. Obviously the union attorney did not anticipate, nor could he, that the question of recognition would still be unsettled in 1973.

21. Initially, Marsh did not join the strike on union instructions because his status as a supervisor was in question. On February 27, Marsh ceased work, apparently joining the strikers.

to bargain on February 23, and the strike ended on June 1. At the end of the strike the Company refused to reinstate Marsh and another striker, Alexander. Marsh was refused reinstatement on the ground that he had quit. Alexander was refused on the strength of the Company's belief that he had provoked and participated in a violent incident related to the picketing at the plant.

On these facts, the Trial Examiner concluded that the Company violated Section 8(a)(5) by refusing to recognize the Union, that the strike was an unfair labor practice strike, and that Marsh and Alexander were unlawfully denied reinstatement in violation of Section 8(a)(3).

The Board concluded that Marsh and Alexander, as economic strikers, were wrongfully denied reinstatement in violation of Section 8(a)(3). It further determined, two members dissenting, to reject the Examiner's conclusion, and held that the Company did not violate § 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

The Board majority began its analysis by noting that the § 8(a)(3) violation did not amount to a serious independent unfair labor practice, and that it could not make a finding that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . ." (*Gissel, supra,* at 614-15). This conclusion is not challenged in this petition for review.

Noting that *Gissel* left open "whether, absent election interference, an employer who insists on an election must initiate the election by his own petition," the Board reviewed the "current practice" on this question alluded to in *Gissel*.[22] The Board

22. The Court stated, 395 U. S. at 594:

> Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election process and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment' to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as an after-thought, that he doubted the union's strength.

then questioned whether the Supreme Court summary "is entirely accurate," particularly whether the Board had ever used the "independent knowledge" test as a basis for a bargaining order. It stated that *Snow & Sons*, 134 NLRB 709, *enf'd*, 308 F. 2d 687 (9th Cir. 1962) did not rest only on the fact of employer *knowledge*, but "also upon the fact that the employer breached his agreement to permit majority status to be determined by means other than a Board election." The Board also distinguished its decision in *Wilder*,[23] observing "[t]here we found an 8(a)(5) violation not only because of admitted employer knowledge of majority status, but also because of the absence of any evidence that the employer was willing to resolve any lingering doubts of majority status through our election procedures." The Board then argued that the "independent knowledge" test was unworkable, and also questioned how it could determine the "willingness" to have majority status determined by an election. The Board stated, "how are we to judge 'willingness' if the record is silent, as in *Wilder*, or doubtful, as here, as to just how 'willing' the Respondent is in fact? We decline, in summary to re-enter the 'good faith' thicket of *Joy Silk*. . . ."[24] The Board indicated that it intended to restrict the scope of § 8(a)(5) to those situations in which the company

23. At this time, the second Board decision, finding an 8(a)(5) violation, was in effect.

24. Joy Silk Mills, Inc., 85 NLRB 1263, enf'd as modified 185 F. 2d 732 (D. C. Cir. 1950).

and union had "voluntarily" agreed "upon [a] mutually acceptable and legally permissible means, other than a Board-conducted election, for resolving the issue of union majority status."

C. *Contentions of the Parties*

The petitioner unions contend that the language and history of §§ 8(a)(5) and 9(a), and subsequent court decisions, establish that an employer has a duty to bargain whenever the union representative presents "convincing evidence of majority support,"that this requires an evaluation of whether "a reasonable man" would consider any particular evidence convincing, and that such convincing evidence was supplied in the instant cases by the recognitional strikes, joined by a majority of their employees. They submit that retention of an independent knowledge test is not inherently unworkable, at least when knowledge is determined on the basis of a recognitional strike.

The Board, on the other hand, has adopted a "voluntarist" view of the duty to bargain. Absent unfair labor practices or an agreement to determine majority status through means other than an election, such as a poll, the employer has no duty to recognize the union. This means, in effect, that as a matter of law, the decision to recognize a union on the basis of cards is entirely within the control of the employer; neither "bad faith" or "independent knowledge" can lay the predicate for recognition because those concepts are deemed unworkable.

II. THE STATUTORY FRAMEWORK

While there is certainly wide latitude for Board policy in enterpreting the requirements of statutory obligations. "The policy of Congress . . . cannot be defeated by the Board's policy," Machinists Local 1424, 362 U. S. 411, 429 (1960). We therefore begin with a brief examination of the legislative materials.

Section 9(a) provides that: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees . . ." Section 8(a)(5) then provides that it shall be an unfair labor practice for an employer "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." *Gissel*, aside from its specific holdings,[25] is important in recognizing that:[26]

> Since § 9(a) . . . refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support."

The view that an election was not the only predicate for a union claim to majority status is given added emphasis by the Conference Committee rejection of that proposal when the basic Act was under revision in 1947. The House version of § 8(a)(5) would have made a refusal to bargain an unfair labor practice only if the union were already certified under § 9(a). This was rejected in favor of the broader Senate version.[27] The language was not changed as the House proposed, even though, as *Gissel* points out, it had been early recognized, by interpretation of the outstanding law, that the employer had a duty to bargain whenever the union representative presented convincing evidence of majority support.

25. The Supreme Court left open the issue presented in the instant cases, 395 U. S. at 595 and 601 n. 18.

26. 395 U. S. at 596.

27. *See* H. R. 3020, 80th Cong., 1st Sess. (1947) (House Bill). The Conference Report, H. R. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947) stated: "The conference agreement . . . follows the provisions of existing law . . . in the case of section 8(5) . . . which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)."

What Congress did do in 1947 was to add a provision, in § 9(c)(1)(B), to give employers the right to file their own representation petitions. It provides:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board— . . .
>
> > (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

These statutory provisions plainly contemplate employer duty of recognition even in the absence of election, and give a safeguard to the employer who has doubts about majority status by assuring him the right to file his own petition for an election. There is no clear cut answer, however, either in the text of the statute or the legislative history, to the question of when and in what circumstances an employer must take evidence of majority support as "convincing." That is the focal issue of these cases.

III. STANDARDS FOR CARD RECOGNITION

In approaching the question of a possible standard for card recognition, we must begin by recognizing that "cards are not the functional equivalent of a certification election,"[28] and elections have a "preferred status" as a means of determining representation.[29] Three reasons are primary in the Board's

28. Comment, Employer Recognition of Unions on the Basis of Authorization Cards: the "Independent Knowledge" Standard, 39 U. Chi. L. Rev. 314, 318 (1972).

29. The Court in *Gissel* noted that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." 395 U. S. at 602.

conclusion that cards do not have the same standing as certification election. (1) There is a greater opportunity for coercion of employees by union organizers, as compared with a secret ballot.[30] (2) Arguably, employees may misunderstand the import of signing an authorization card, because of misreading, failure to read, or union misrepresentation.[31] (3) When cards are used, the employer has no opportunity to speak to his employees concerning their determination to have union representation, and an employers' right to communicate to employees concerning representation is arguably guaranteed under § 8(c) of the Taft-Hartley Act.[32] Out of these considerations arises an inhibition on the part of the Board to expand the mandatory scope of a duty to bargain on the basis of cards.

A. *The Independent Knowledge Standard*

Prior to the present litigation, the Board implemented the policy favoring elections over cards by adopting a limited scope for a duty to bargain in the absence of election. The rule adopted by the Board has been described as the "independent knowledge" standard.[33]

This rule developed from the case of *Snow & Sons*[34] where the employer, upon being presented with an apparent card

30. Comment, *Refusal-to-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. Chi. L. Rev. 387, 390 (1966). While this argument certainly has force on its face, its force is presumably subject to discount for the ability of union organizers to effectively influence votes in election campaigns.

31. *See* Note, *Union Authorization Cards*, 75 Yale L. J. 805, 823; Cf. Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851 (1967).

32. Courts have protected the employer's right to influence the vote of his employees through non-coercive speech. *See* Thomas v. Collins, 323 U. S. 516, 537-38 (1945); NLRB v. Virginia Elec. & Power Co., 314 U. S. 469 (1941); Suprenant Mfg. Co. v. NLRB, 341 F. 2d 756 (6th Cir. 1965).

33. Comment, note 28 *supra*, at 319.

34. 134 NLRB 709 (1961), *enforced*, 308 F. 2d 687 (9th Cir. 1962).

majority, at first refused to recognize the union and insisted that it petition for an election. Subsequently, the employer agreed to submit the cards to an impartial third party, but after authentication, the employer refused recognition claiming he never considered the agreement binding. The Board held that, given the authentication, the refusal to bargain was not based on a reasonable doubt as to the union's majority. During the 1960's the *Snow & Sons* doctrine was applied where an employer had reneged on an agreement to have the cards authenticated by an impartial party and to be bound by such authentication.[35]

We interject to note that at this time—prior to *Gissel* in 1969—the applicable doctrine defined an employer's right of non-recognition as applicable only in case of a "good faith doubt as to the unions' majority status." Joy Silk Mills, Inc. v. NLRB, 87 U. S. App. D. C. 360, 185 F. 2d 732 (1950); Retail Clerks Union, Local No. 1179 v. NLRB, 376 F. 2d 186 (9th Cir. 1967). In *Gissel*, the Board announced "at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether."[36] The Court further stated the Board's position at that time (395 U. S. at 594):

> Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition because of questions as to the appropriateness of the unit and then later claim, as an afterthought, that he doubted the union's strength.

35. Lesnick, *supra* note 31, at 852.

36. The "good faith" doubt test of *Joy Silk* had been widely criticized as plunging the Board and courts into a search for subjective intent. *See* Christensen & Christensen, Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions Under the NLRA, 37 U. Chi. L. Rev. 411 (1970). It is one thing to abandon a subjective standard used to determine when employers are required to recognize on the basis of cards and replace it by the alternative, and arguably more objective, standard of "independent knowledge". That was the Supreme Court's understanding in *Gessel*. It is another thing to abandon any standard.

Subsequent to *Gissel*, two Board decisions expanded on the *Snow* rationale. In *Pacific Abrasive*,[37] presentation of the card majority was accompanied by the employer's verification of the signature on the cards, an acknowledgement of authenticity, conversations with employees who indicated union support, and a strike in support of recognition by a majority of the unit. The Board was thus relying on conduct of the employer or employees, in drawing the inference that the employer must have known that the union had a majority.[38] *Pacific Abrasive* was followed by the second decision in the instant case, *Wilder*, where the Board established "independent knowledge" on the basis of evidence in addition to mere cards, sufficient to communicate to the employer "convincing" knowledge of majority status.[39] In the Board opinions now before us for review, the Board has retreated to the facts of *Snow & Sons*, the fact of an agreement to be bound by an independent authentication, as offering the only valid basis for an employer duty to bargain on the basis of "independent knowledge." Thus, "[u]nless, as in *Snow & Sons*, the employer has agreed to let its 'knowledge' of majority status be established through a means other than a Board elec-

37. 182 NLRB 329, 74 LRRM 113 (1970).

38. Comment, *supra*, note 28, at 321.

39. The Board relied on the following facts in finding "independent knowledge":

> In the instant case, the record demonstrates not only that 11 out of 18 production and maintenance employees had signed authorization cards, but also that all of the card signers dramatically evidenced their support for the Union by actively participating in a picket line and in a strike, and furthermore, that an officer of the Respondent conceded in his testimony that he told his fellow officers that the Union "had 10 or 11" of his employees.

tion" (JA at 53-54) the facts will not justify an 8(a)(5) bargaining order.

It is important to understand, however, that it was represented to the Supreme Court in *Gissel* that the facts of *Snow & Son* laid the predicate for a finding of independent knowledge, not that a finding of "independent knowledge" was restricted to such facts.[40] The Board in its decision questions whether the Supreme Court accurately summarized its position.[41] This is not just a matter of historical detail; inherent in the two positions is a difference which goes to the heart of the Congressional policy established by the statute.

The abandonment of *Wilder II* means that even if an employer acts in total disregard of "convincing evidence of majority status," he has no duty to recognize a union. That duty can only be triggered by his own permission, in allowing an impartial party to assess union strength.

There were a number of indices in both *Wilder* and *Linden Lumber*, which could have laid the predicate for "convincing evidence of majority status"; in *Wilder*, there was a strike in support of the cards, and an admission of Respondent that the Union had "10 or 11" of his employees; in *Linden Lumber*, there was a recognitional strike, and a renege on the employer's agreement to abide by an election outcome after a "fresh" showing of a thirty percent support. The Union argues that these facts necessarily lay the foundation for a bargaining order.

Recognitional Strikes Not Necessarily Predicate for 8(a)(5) Bargaining Order

As to recognitional strikes in support of a card majority, we do not think prior cases establish this a conclusive showing of "convincing evidence." Petitioners place primary reliance on United Mine Workers v. Arkansas Oak Flooring Co., 351 U. S. 62 (1956), but that case merely established that a state court

40. *See* 395 U. S. at 594, quoted above.

41. JA at 53.

could not enjoin a recognitional strike where there was a card majority, solely because the union had failed to take necessary steps toward securing a Board election. The issue as to whether a recognitional strike laid the foundation for an 8(a)(5) charge was not before the court.[42] While there are circuit court decisions indicating that a strike supported by a unit majority undermines a good faith claim of doubt as to majority status, these cases are distinguishable.[43] There is no case holding that the statute requires the Board to use recognitional strikes as conclusive evidence, and it is that position for which the union contends.

42. Petitioners point to the following passage in *Gissel*, 395 U. S. at 596-97, as establishing the Court's acceptance of recognitional strikes as necessarily showing convincing support:

> Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as a winner of a Board election to invoke a bargaining obligations: it could establish majority status by other means under the unfair labor practice provision of § 8(a)(5)—by showing convincing support, for instance, by a union called strike or strike vote, or as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.[11] [Footnote omitted.]

However, this passage merely begs the question here at issue, since the Court was simply using strike votes and cards as alternatives. Not even the union contends here, nor has it ever been Board practice, that a card majority *per se* invokes a duty to bargain. This is given added emphasis by footnote 11 of the above cited passage from *Gissel* which reads:

> The right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union's majority status, even if in fact the Union did represent a majority, was recognized early in the Administration of the Act, see NLRB v. Remington Rand, Inc., 94 F. 2d 862, 868 (C. A. 2d Cir.), cert. denied, 304 U. S. 576 (1938).

43. *See, e.g.*, NLRB v. Harris-Woodson Co., 179 F. 2d 720 (4th Cir. 1950) (recognitional strike, in context of refusal to negotiate with an already certified unit); NLRB v. National Seal Corp., 127 F. 2d 776 (2d Cir. 1942) (recognitional strike accompanied by independent unfair labor practices, and anti-union animus of predecessor corporation).

Even assuming some test such as "independent knowledge" is required by the statute, that does not mean the Board must attach conclusive weight to recognitional strikes. As the Court described the role of the Labor Board in Republic Aviation Corp. v. NLRB, 324 U. S. 793, 800 (1945), "One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." It is certainly permissible for the Board to avoid encouraging recognitional striking and picketing by refusing to regard them as an independent and conclusive method of demonstrating a majority, particularly since workers might well honor a picket line without necessarily supporting the union.[44]

Other Evidence of Majority Support

Aside from the fact that in *Linden Lumber* the employer refused to acknowledge the "fresh" showing of majority support —which we deal with below in a different context—the only other indication of majority support was the admission of the employer in *Wilder* to other officers of the Company, that the Union "had 10 or 11 of his employees." While the Second Supplemental Decision of the Board did not comment directly on this evidentiary point, relied upon in its First Supplemental Decision, disregard of this evidence was apparently related to the Board's rejection of "the wisdom of attempting to divine, in retrospect the state of employer (a) knowledge, depicting this as re-entry into the "good faith thicket." We assume the "10 or 11" statement was made by the employer, for the Board seemingly does not contest this prior Board finding. While it

44. Refusal to cross a picket line may reflect mere fear, *see* NLRB v. Union Carbide Corp., 440 F. 2d 54, 56 (4th Cir. 1971), *cert. denied*, 404 U. S. 826 (1971). Or it may reflect a respect for what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative.

may be that there would be difficulties in determining the state of past employer knowledge, in this case and in others, we cannot accept the view that this requires a union petition for an election as the only means for obtaining recognition. We turn, at this juncture, to another predicate for issuing a bargaining order, related to "independent knowledge" and its "good faith" predecessor: the failure of the company to evidence its own "good faith doubt" by itself petitioning for an election.

B. *Failure of Employer to Petition for Election as Pertinent to "Good Faith"*

In *Gissel*, the Court reviewed the legislative history of § 9(c)(B) of the 1947 Taft-Hartley Amendments. The Supreme Court stated, 395 U. S. at 599:

> That provision was not added, as the employers assert to give them an absolute right to an election at any time; rather, it was intended, as the legislative history indicates, to allow them, after being asked to bargain, to test out their doubts as to a union's majority in a secret election which they would then presumably not cause to be set aside by illegal antiunion activity [footnote 16 omitted].

In footnote 16, the Supreme Court noted that the Senate Report clearly indicates that the right to petition for an election was a way in which the employer could remove his doubt.[45] Neither Wilder nor Linden indicated that it wishes to have a doubt resolved by petitioning for an election. In the First Supplemental Decision in *Wilder*, two reasons were given for

45. As the Supreme Court noted, Senator Taft stated during the debates:

> Today an employer is faced with this situation. A man comes into his office and says "I represent your employees. Sign this agreement, or we strike tomorrow". . . . The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board . . . and say "I want an election. I want to know who is the bargaining agent for my employees."

finding a violation of the duty to bargain. Besides holding that the employer had "independent knowledge" of the union's majority statute, the Board found that there was "insufficient evidence that the employer's refusal to grant recognition was based upon genuine willingness to resolve any doubts concerning majority status through the Board's election process," noting that "the Employer did not itself file an election petition or urge or even suggest to the employees or the Union the use of such procedures."

In *Linden*, of course the union did file a petition for an election simultaneous with its demand for recognition. The employer, however, after refusing to recognize on the basis of cards, indicated that he would not recognize the union even if it were victorious in an election. This led the Union to withdraw their petition and go straight to the 8(a)(5) proceeding, which was inevitable, in any event, at the end of the election process.

Of course, in *Linden*, the Board indicated that this fact would play no part in its decision since it was reassuring "the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge" and "(b) intent at the time he refuses to accede to a union demand for recognition." The Board went on to state " . . . if we are to let our decisions turn on an employer's 'willingness' to have majority status determined by an election, how are we to judge 'willingness' if the record is silent, as in *Wilder*, or doubtful, as here, as to just how 'willing' the Respondent is, in fact."

Whatever the merit of abandoning the "independent knowledge" doctrine because of the difficulty of reaching judgments required as to state of mind, the same cannot be said as to "willingness to have majority status determined by an election." One simple act, a petition by the employer for an election,[46] could evidence such "willingness." Indeed it was the premise

46. Or an employer's voicing of a consent to abide by an election ordered on union petition.

of the Taft-Hartley Amendment to § 9(c)(B) that employers could "test out their doubts as to a union's majority status" by petitioning for an election. In ignoring that opportunity, the Board ignores the very intent behind the statutory provision.

It is our view that the Board order cannot be enforced where both tests have been abandoned. It is conceivable that a restriction of "independent knowledge" to an agreement to abide by an authentication would be acceptable, if the employer was required to evidence his good faith doubt as to majority status, by petitioning for an election. The Board, on the other hand, is willing to resolve every assertion of doubt in the employer's favor, without permitting any "test" of those doubts. The union, of course, argues that an employer would violate § 8(a)(5) by petitioning for an election without entertaining actual doubt. This is, however, an issue we need not reach.

While we have indicated that cards alone, or recognitional strikes and ambiguous utterances of the employer, do not necessarily provide such "convincing evidence of majority support" so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid both any duty to bargain and any inquiry into the actuality of his doubt.[47]

47. The Board might, in order to reduce litigation and delay in these matters, adopt the rule that an employer must, when presented with an authorization card majority, either recognize the union or, within a reasonable time, petition for a certification election. Comment, *supra* 28, at 325. Without such a *per se* rule, of course, the Board would have to use some version of the "independent knowledge" test it considers workable, in order to define those conditions where a failure of an employer to petition for an election would be a predicate for an 8(a)(5) bargaining order.

When an employer petitions for or consents to election, the election process is expedited.[48] If he declines to exercise this option, he must take the risk that his conduct as a whole, in the context of "convincing evidence of majority support," may be taken as a refusal to bargain.

As is only too often the case in litigation trenching on deep feelings, each of the parties focused on its extreme position—the unions, on their claim to an 8(a)(5) order based on an "independent knowledge" test retained in full flower; the Board and the companies, on their claim that an 8(a)(5) obligation can flower only in case of employer consent to authentication. And so the position set forth in this opinion was not advanced by the parties. It was presented by the court during the course

48. Board member Fanning, dissenting in the Second Supplemental Decision in *Wilder*, observed that:

> [O]ur experience in conducting elections demonstrates that where employers are willing to go to an election, the election is held more expeditiously and with far less likelihood of interference in the conduct of the election than is the case where either party has to be forced to an election.

One commentator, on the basis of an interview with Martin Schneid, Assistant to the Regional Director, NLRB, has concluded that "an election contested through submission of objections at a pre-election hearing is likely to take sixty to sixty-three days between petition and balloting, while a consent election, in which the hearing is waived, is likely to take only twenty to twenty-three days. Comment, *supra* note 28, at 325 n. 48.

The additional speed is obtained by the ability to dispense with objections at a prehearing conference. If an employer files a petition for an election, he would be required to define the appropriate unit and therefore would not be entitled, as an objecting party, to request a hearing. Nor could the employer object to a sufficient (30%) showing of majority support.

The direct consequences of such a rule are immediately apparent in the context of *Wilder* where the employer challenged the appropriateness of the unit—this was, in fact, an asserted reason for not recognizing the union on the basis of cards—and in *Linden Lumber* where the employer raised his possible § 8(a)(2) liability for recognizing a union dominated by supervisors, as well as connected unit problems. Yet the trial examiners in both cases found there was no basis for such concerns, thus indicating how such issues may be used to delay elections.

of argument, and counsel had an opportunity to develop whatever objections were seen. If objections had subsequently been visualized, leave to file a post-argument memorandum could have been sought, and properly so. Hearing no such objection, and seeing none ourselves on further reflection[49], we conclude the principle herein set forth is sound.

49. We take note of the possibility that an employer may contend that he does not want to petition for an election because he fears that an agreement with the certified union may be challenged as a "sweetheart" deal prohibited by § 8(a)(2). Such a contention is more likely to reflect a tactic than a genuine problem. This seems to have been the case in *Linden*, where the employer first objected to the Union petition for election on the ground of inclusion of supervisors in the unit, then promised to proceed with a consent election if the Union made a fresh start, yet later objected to a new Union showing of interest on a petition for election established without cards from the challenged persons, on the ground that the problem was not remediable.

In any event, to the extent that an employer's petition for election may be followed by an issue under § 8(a)(2), on a "sweetheart" objection, this is a modest and limited difficulty which was accepted by Congress as an objection lacking sufficient significance to override the value of employer petitions in arrivng at labor peace and resolution of problems.

Of course, the possibility exists—indeed it was raised in *Linden Lumber*—that the employer would be subject to an 8(a)(5) violation if he did not recognize a union, but subject to an 8(a)(2) charge if he did, and it was later found that the Union was employer-dominated. This possibility is significantly increased, it could be argued, by taking away the possibility of raising the 8(a)(2) defense to a union election petition, as a self-protection measure of the employer. *See* International Ladies' Garment Workers Union v. NLRB, 366 U. S. 731 (1961). One possible reply to this dilemma is that it is less of a problem following an election, as compared to the situation which would exist if the only option was card recognition. *See id.* at 739; *Compare* Shea Chemical Corp., 121 NLRB 1027 (1958).

IV. CONCLUSION

We hold that if "independent knowledge" is to be restricted, some alternative must be put in its place to prevent an employer's deliberate flouting and disregard of union cards without rhyme or reason. The complete lack of such an alternative would not be consistent with the Act. If no "independent knowledge" or "good faith" test is to be used by the Board, the employer must be put to some other kind of test to evidence good faith. *Compare* Food Store Employees Union v. NLRB, 476 F. 2d 546, 554 (D. C. Cir. 1973). The alternative such as employer petition for election retains primary emphasis on the election process, and its preferred status. The position adopted by the Board is inconsistent with the Act and its orders must be reversed. We remand to the Board to reconsider what option, consistent with the statute, it wishes to follow.

Reversed and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1972

No. 71-1529

TRUCK DRIVERS UNION LOCAL NO. 413, ETC., ET AL.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

No. 72-1794

TEXTILE WORKERS UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petitions for Review of Orders of the National Labor Relations Board

Before: LEVENTHAL and ROBB, *Circuit Judges* and JAMESON,* *Senior United States District Judge* for the District of Montana

* Sitting by designation pursuant to 28 U. S. C. § 294(d).

JUDGMENT

The causes came on to be heard on petitions for review of orders of the National Labor Relations Board and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the orders of the National Labor Relations Board appealed from in these causes are hereby reversed and these cases are hereby remanded to the National Labor Relations Board in accordance with the opinion of this Court filed herein this date.

Per Curiam for the Court

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

Date: September 13, 1973

Opinion for the Court filed by Circuit Judge Leventhal

APPENDIX C

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1973

No. 71-1529

TRUCK DRIVERS UNION LOCAL NO. 413, ETC., ET AL.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 72-1794

TEXTILE WORKERS UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Before: LEVENTHAL and ROBB, *Circuit Judges;* and JAMESON,* *United States Senior District Judge* for the District of Montana

* Sitting by designation pursuant to Title 28, U. S. C. § 294(d).

ORDER

The Clerk is directed to file the lodged motions of Linden Lumber Division, Summer & Co.:

(1) to intervene;

(2) for enlargement of time to file petition for rehearing.

On consideration thereof and of petitioner's opposition to motion to intervene, it is

ORDERED by the Court that each of the aforesaid motions is granted and the Clerk is directed to file the lodged petition of Linden Lumber Division, Summer & Co., for rehearing and suggestion for rehearing *en banc*.

The Court is granting Linden leave to intervene, in order that it may have standing to seek rehearing and possibly certiorari, but taking into account Linden's late intervention as a party, and the content of its petition for rehearing filed October 12, 1973 the Court's order hereby provides that this intervention shall not stay issuance of the mandate, and that the mandate will issue five days after the entry of this order. This will serve to permit NLRB's further consideration of this already elongated proceeding without being compelled to await the disposition of such further pleadings as Linden may file.

Per Curiam

APPENDIX D

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1973

No. 71-1529

TRUCK DRIVERS UNION LOCAL NO. 413, ETC., ET AL.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

No. 72-1794

TEXTILE WORKERS UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Before: LEVENTHAL and ROBB, *Circuit Judges;* and JAMESON,* *United States Senior District Judge* for the District of Montana

ORDER

On consideration of the petition of Intervenor, Linden Lumber Division, Summer & Co., for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

* Sitting by designation pursuant to Title 28, U. S. C. § 294(d).

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-617

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 10, 1974.

/s/ W. E. B.
Chief Justice of the United States.

Dated this 20th day of December, 1973.

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LINDEN LUMBER DIVISION, SUMMER & CO. [Columbus, Ohio]	[190 NLRB No. 116]
and	
TRUCK DRIVERS UNION Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America	Cases 9-CA-4197 9-CA-4283 9-CA-4309

DECISION AND ORDER

On January 26, 1968, Trial Examiner Ivar H. Peterson issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof. The Charging Party filed an answering brief.

Thereafter, by Order of April 15, 1968, the National Labor Relations Board remanded the proceeding to Trial Examiner Peterson to consider further Respondent's defense to the 8(a)(5) allegation, by making findings of fact concerning (1) the supervisory status of Shafer and (2) if a supervisor, the impact of Shafer's conduct on the validity of the Union's card majority, and for making any other or additional findings based on the record as supplemented, if necessary, by evidence received at a reopened hearing.

On April 26, 1968 the Trial Examiner issued his Supplemental Decision, also attached hereto, making findings in accord with the remand. He concluded that it was unnecessary to take additional evidence because the existing record established that Shafer was a supervisor and that Shafer did not taint the Union's majority by either signing a card or any other conduct. The Trial Examiner also indicated that he would adhere to the findings, conclusions, and recommendations contained in his original Decision of January 26, 1968. Thereafter, Respondent filed exceptions to the Supplemental Decision and a brief in support thereof.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions thereto, the brief and answering brief, the Supplemental Decision, the exceptions thereto and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith:

The facts are fully set forth in the Trial Examiner's Decisions. On December 28, 1966, employee Martin contacted Union Representative Norman about organizing Respondent's employees. The next day Norman held a meeting during which 12 employees, including 2 alleged supervisors, Shafer and Marsh, signed authorization cards. (The parties stipulated that the unit consisted of 12 employees, excluding 3 whose eligibility was disputed.) On January 3, 1967, the Union sent a letter to the Respondent requesting recognition and on January 5 filed a representation petition (Case 9-RC-7096). On January 6, the Respondent replied that it did not believe the Union represented a majority and suggested that the Union petition the Board for an election. On January 9, pursuant to the RC petition, the Respondent submitted a list of employees which included Shafer and Marsh as well as one other employee stipu-

lated by all parties at the hearing to be a supervisor, and a dispatcher on whose status all parties reserved.

On February 3, at a prehearing conference on the Union's petition attended by the parties, Marsh and Shafer were present as employee representatives of the Union. During that conference, Union Attorney Smedstad asked Company Consultant Rector if the Respondent would enter into a consent election agreement. Rector replied that since the Union had been organized by supervisors (Marsh and Shafer) it would be unlawful for the Company to recognize it according to cases in the Sixth Circuit. At that point the Hearing Officer stated that evidence of organization by supervisors did not warrant a hearing since the Union's showing of interest could not be litigated in a representation proceeding. Rector then said, "Well, if you are going to deny me the right of a record on this, then the Board can do what it wants to. If it holds an election, the Company will not bargain with the Union." (At that time the issues going to the validity of an election were limited to the validity of the Union's showing, there being no dispute on jurisdiction, labor organization, or the appropriate unit.)

Immediately after Rector's statement, the union representatives withdrew the representation petition. After the withdrawal was approved Rector told Smedstad that if the Union submitted a new petition supported by a "fresh" 30-percent showing of interest, the Company would go to a consent election. When Smedstad replied that the Union had "all the people lined up," Rector retorted that, since supervisors had solicited these people, there was no fresh showing. Moreover, the Respondent would not bargain with the Union and there was no chance for a consent election at this point.

Subsequently, at a meeting on February 4, nine employees signed a statement that they voluntarily desired union representation and believed the Company would not want them to join the Union. While Shafer and Marsh attended the meeting, they

did not sign the statement. Shafer resigned from Respondent's employ on February 6.

On February 6, Norman presented the statement to the plant manager who said that he would refer the matter to Rector. On February 8, Rector wrote Norman that the Respondent refused to recognize the Union because its membership included supervisors who influenced employees, therefore, Respondent's recognition would violate Section 8(a)(2). The letter also stated that the Union had the opportunity to prove its claim before the National Labor Relations Board, but withdrew its petition. The letter concluded that although the Board should decide this matter, it is "powerless" to do so because of the withdrawal of the RC petition.

On February 15, the employees went out on strike in support of the Union's demand for recognition. Initially, Marsh did not join the strike on union instructions not to do so because his status as a supervisor was in question. On February 27, Marsh ceased work, apparently joining the strikers. The Union filed its charge of refusal to bargain on February 23, and the strike ended on June 1.

At the end of the strike Respondent refused to reinstate Marsh and another striker, Alexander. Marsh was refused reinstatement on the ground that he had quit. Alexander was refused on the strength of Respondent's belief that he had provoked and participated in a violent incident related to the picketing at Respondent's plant.

On these facts, the Trial Examiner concluded that Respondent violated Section 8(a)(5) by refusing to recognize the Union, that the strike which occurred was an unfair labor practice strike, and that Marsh and Alexander were unlawfully denied reinstatement in violation of Section 8(a)(3). The Trial Examiner's recommended remedy included a direction to Respondent to recognize and bargain with the Union. We disagree with the Trial Examiner's conclusion that Respondent violated Section 8(a)(5), and we reject the conclusion that the strike was an unfair labor practice strike. We conclude nevertheless that Marsh and Alexander, as economic strikers, were wrongfully denied reinstatement in violation of Section 8(a)(3).

Our conclusion that Respondent violated Section 8(a)(3) requires, as a threshold matter, that we examine the nature of the violations and their probable impact on Respondent's employees in order to determine whether an order to bargain is an appropriate remedy for those violations under the standards of *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969). *Gissel* establishes our discretion to impose a remedial order to bargain in any case where we find that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . . *"Id.*, 614-615. We conclude that Respondent's violations here did not have such an impact on the employees that a fair and truly representative election could not have been conducted. We reach this conclusion upon assessment of the extensiveness of the practices, their effect on election conditions (although the Union withdrew its petition and no election was conducted) and the likelihood of their recurrence. We rely on the facts, among others, that the violations were quite distant in time from the start of the union organizing campaign and occurred under circumstances which could not readily be regarded by other employees as retribution for any organizing activity. Nor are we persuaded that there is substantial likelihood that such practices will recur. The Respondent here declined to reinstate the two employees for reasons which do not suggest far-reaching antiunion animus: Marsh was thought by Respondent, albeit mistakenly, to be a supervisor; Alexander was thought to have engaged in picket line misconduct. Although we now conclude that Respondent's

defense as to each is insufficient, and that each violation occurred, we cannot assume, on these facts, that Respondent was motivated, in either case, by other than a good-faith belief in the propriety of its actions. Such impact as there may have been will, in any event, be substantially erased by our traditional remedy of reinstatement, backpay, and posting of notices.

We next consider whether, aside from the rationale of *Gissel*, an order to bargain may be imposed on the ground that Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union following the Union's proffer of authorization cards from a majority of Respondent's employees.

We recently held in *Derse, Arthur F., Sr., President, and Wilder Mfg. Co., Inc.*,[1] that mere refusal to recognize on the strength of a card showing was not enough to support a finding of an 8(a)(5) violation. We did, however, find a violation under the facts of that case where the employer had independent knowledge of the union's majority status and where no effort was made to resolve any possible majority status issue through resort to Board election procedures.

In the instant case we must evaluate a refusal to recognize the Union on the strength solely of its authorization cards, an abortive Board election proceeding, and then a strike. The election proceeding was terminated by action of the Union in withdrawing its petition although that withdrawal appears to have been motivated by the precipitate declaration of Respondent's representative that "if [the Board's] holds an election, the Company will not bargain with the Union." This statement in turn was motivated by the Hearing Officer's ruling that evidence of possible supervisory taint of the showing of interest would not be received at the hearing, since the investigation of showing of interest is an administrative matter which cannot be litigated in the course of a representation proceeding. Subsequently, the Employer's representative offered to consent

1. 185 NLRB No. 76.

to an election if the Union submitted a new petition supported by a "fresh" 30-percent showing of interest.

The facts of this case demonstrates the difficulties of attempting to interpret and apply Section 8(a)(5) of the Act to situations in which the Union's majority status has not been established through our election processes, and where the record does not contain evidence of independent unfair labor practices which would justify a bargaining order under *Gissel*.

At the outset, we note that in *Gissel* the Supreme Court did not face this issue and explicitly refrained from providing any guidance in this area. Rather, after setting forth its understanding of the positions of the parties as to a proper interpretation of the law applicable to the cases then at bar, the Court declared that it "need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes." *Id.*, 595. Later in its opinion the Court reiterated and elaborated upon this point:

> In dealing with the reliability of cards, we should reemphasize what issues we are not confronting. As pointed out above, we are not here faced with a situation where an employer, with "good" or "bad" subjective motivation, has rejected a card-based bargaining request without good reason and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices that would tend to disturb the "laboratory conditions" of that election. We thus need not decide whether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless of his earlier good faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute. In short, a union' right to rely on cards as a freely interchangeable substitute for elections where there has been no election

> interference is not put in issue here; we need only decide whether the cards are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside [*Id.*, 601, fn. 18.]

The resolution of the instant proceeding now requires the Board to face and decide one of the difficult issues which the Supreme Court left open in *Gissel*: whether, absent election interference, an employer who insists on an election must initiate the election by his own petition. Board precedent on the issue is something less than a model of clarity. The "current practice" of the Board was summarized in *Gissel* as follows:

> Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance or a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election.
>
> Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the and then later claim, as an afterthought, that he doubted the union's strength. [Id., 594.]

There is some question as to whether the summary is entirely accurate. The statement that an employer could not refuse to bargain "if he *knew*, through a personal poll for instance, that a majority of his employees supported the union," may well have referred to *Snow, Fred, Harold Snow and Tom Snow, d/b/a Snow & Sons*, 134 NLRB 709, enfd. 308 F. 2d 687

(C. A. 9). But the decision in that case rested not only on the fact of employer *knowledge*, but also upon the fact that the employer breached his agreement to permit majority status to be determined by means other than a Board election. That case must be distinguished from our recent decision in *Wilder, supra*. There we found an 8(a)(5) violation not only because of admitted employer knowledge of majority status, but also because of the absence of any evidence that the employer was willing to resolve any lingering doubts of majority status through our election procedures.

The facts of the present case have caused us to reassess the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge and (b) intent at the time he refuses to accede to a union demand for recognition. Unless, as in *Snow & Sons*, the employer has agreed to let its "knowledge" of majority status be established through a means other than a Board election, how are we to evaluate whether it "knows" or whether it "doubts" majority status? And if we are to let our decisions turn on an employer's "willingness" to have majority status determined by an election, how are we to judge "willingness" if the record is silent, as in *Wilder*, or doubtful, as here, as to just how "willing" the Respondent is in fact? We decline, in summary, to reenter the "good-faith" thicket of *Joy Silk*,[2] which we announced to the Supreme Court in *Gissel* we had "virtually abandoned . . . altogether," *id.*, 594.

These considerations lead us to the conclusion that Respondent should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election. We repeat for emphasis our reliance here upon the additional fact that the Respondent and the Union never voluntarily agreed upon any mutually acceptable and legally permissible means, other than a Board-conducted election, for resolving the issue of union

2. *Joy Silk Mills, Inc.*, 85 NLRB 1263, enfd. as modified 185 F. 2d 732.

majority status. By such reliance we recognize and encourage the principle of voluntarism but at the same time insure that when voluntarism fails the "preferred route" of secret ballot elections is available to those who do not find any alternative route acceptable.

We shall, therefore, dismiss the 8(a)(5) allegations of the instant complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Linden Lumber Division, Summer & Co., Columbus, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discriminatorily failing or refusing upon their unconditional request to reinstate any of its employees who have engaged in a strike and are lawfully entitled to reinstatement, or by discriminating against its employees in any other manner in regard to hire or tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Notify the said employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due and to analyze reinstatement rights under the terms of this Order.

(d) Post at its premises in Columbus, Ohio, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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3. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS HEREBY FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D. C.

EDWARD B. MILLER,
Chairman
HOWARD JENKINS, JR.,
Member
RALPH E. KENNEDY,
Member
NATIONAL LABOR RELATIONS BOARD

MEMBERS FANNING and BROWN, dissenting:

For the reasons explained below, we would affirm the Trial Examiner's finding that the Respondent's refusal to recognize and bargain with the Union violated Section 8(a)(5) of the Act and that, in the circumstances presented, a bargaining order is clearly warranted.

Under settled Board and court policy, an employer, when confronted by a recognition demand based on authorization cards allegedly signed by a majority of his employees, does not automatically violate Section 8(a)(5) of the Act if he declines such demand and insists, instead, upon an election requesting the union to file a representation petition or filing it himself under Section 9(c)(1)(B) of the Act.[4] Such violations are most frequently found where the employer's denial of recognition is accompanied by independent unfair labor practices impeding the Board's election processes. This is not to say, however, that such unlawful conduct is an indispensable prerequisite to an 8(a)(5) finding, or that, absent such independent unfair labor practices, employers are necessarily free to decline recognition until the Union shall have been certified. Thus, an employer may not avoid or delay his statutory obligation to bargain where there

4. See discussion of *N. L. R. B.* v. *Gissel Packing Company, Inc.*, 395 U. S. 575, *infra*.

is no real dispute that a union represents a majority of his employees and the refusal to bargain is founded upon considerations extraneous to the union's majority status.[5] In the absence of such a dispute, an employer violates Section 8(a)(5) of the Act if his refusal to bargain is based, for example, on an erroneous view of the law,[6] or an erroneous belief that the unit requested by the union is inappropriate,[7] or that the union representatives were under a legal disability which prevented them from binding the union,[8] or that his employees were independent contractors.[9]

Similarly, an employer, having satisfied himself (by card check, independent poll of the employees, or by other means) that a union enjoys the support of a majority of his employees, may not thereafter assert a doubt of the union's majority as grounds for refusing to bargain and insisting on an election.[10] In *Snow & Sons, supra*, for example, we held, with court approval, that the employer violated Section 8(a)(5) where, having agreed to be bound by an independent check of a union's authorization cards to resolve his doubt as to the union's majority status—which check substantiated the union's claim of majority—the employer reneged on his agreement by continuing to refuse to bargain and insisting upon an election.

Briefly, the facts in this case show that, in response to the Union's initial recognition demand, the Respondent, on January

5. *H & W Construction Company, Inc.*, 161 NLRB 852, 854-855, and cases cited therein.

6. *Old King Cole, Inc.* v. *N. L. R. B.*, 260 F. 2d 530, 532 (C. A. 6).

7. *United Aircraft Corporation* v. *N. L. R. B.*, 333 F. 2d 819, 833 (C. A. 2), cert. denied 380 U. S. 910; *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289 (C. A. 4).

8. *N. L. R. B.* v. *Burnett Construction Co.*, 350 F. 2d 57 (C. A. 10).

9. *N. L. R. B.* v. *Keystone Floors, Inc., d/b/a Keystone Universal Carpet Co.*, 306 F. 2d 560, 564 (C. A. 3).

10. *Snow & Sons*, 134 NLRB 709, enfd. 308 F. 2d 687 (C. A. 9), cited with approval in *Gissel Packing Co., Inc.*, 395 U. S. 575; *Wilder Mfg. Co.*, 185 NLRB No. 76.

6, 1967, replied that it did not believe that the Union represented a majority and suggested that the Union petition the Board for an election. The Union had already filed such a petition on January 5. On February 3, when the parties met for a prehearing conference pursuant to the Union's petition, the Respondent announced that it would not bargain with the Union in any event—even if it were certified by the Board after winning an election—because it contended that the Union represented supervisors (Marsh and Shafer) who influenced the employees in signing authorization cards.[11] The Union thereupon withdrew its petition and, after withdrawal was approved, the Respondent's representative, Rector, told the Union's attorney, Smedstad, that if the Union submitted a "fresh" 30-percent showing of interest the Company would agree to a consent election.

At a meeting with the Union on the following day, February 4, nine employees signed a statement that they voluntarily desired to be represented by the Union and that they believed the Company would not want them to join the Union. Although alleged supervisors Marsh and Shafer attended that meeting, they did not sign the statement. Shafer resigned from Respondent's employ on February 6. On that day the Union's representative presented the employees' statement of reaffirmation to the Company and, on February 8, Rector wrote to the Union that the Respondent refused to recognize the Union because its membership included supervisors who influenced employees and that, therefore, recognition would violate Section 8(a)(2) of the Act. On February 15, a majority of the employees in the unit went out on strike in support of the Union's recognition demand. On advice of the Union, alleged supervisor Marsh did not participate in the strike, as his status was in dispute.

11. Alleged supervisors Marsh and Shafer attended this conference as employee representatives of the Union. Their status is discussed, *infra*.

Based on the foregoing facts, which our colleagues do not dispute, it is clear that, at the time of the Respondent's refusal to bargain on February 8, there was no question and the Respondent had no doubt that a majority of its employees supported the Union and wanted the Union to represent them for purposes of collective bargaining, and that its refusal was grounded solely upon an erroneous belief that supervisors had influenced the unit employees and that, therefore, the Union's majority was tainted. In these circumstances, we would find, for the reasons substantially as stated in *H & W Construction Company, Inc.*,[12] that the contentions asserted by the Respondent for refusing to bargain, being unrelated to the Union's majority status, did not constitute an adequate defense to the refusal-to-bargain complaint and that the refusal to bargain, therefore, violated Section 8(a)(5) of the Act. For, neither the statement signed by the nine employees nor the strike in which a majority of the employees openly reaffirmed their support of the Union indicated any participation or influence by alleged supervisors. Furthermore, the record establishes, and the Trial Examiner found, that Marsh was not a supervisor and, in light of the facts, the Respondent's contention to the contrary borders on frivolity. As to Shafer, whom the Trial Examiner found to be a supervisor, there is no evidence that he influenced the employees to support the Union. In fact, and because their status was in issue, neither Marsh nor Shafer signed the statement in which a majority of the employees reiterated their voluntary allegiance to the Union. In addition, Shafer resigned from the Respondent's employ on February 6, 2 days before the Respondent refused to bargain with the Union on grounds of alleged supervisory influence. Therefore, even assuming, *arguendo*, that Shafer's presence at the February 4 union meeting may have indirectly influenced employees (a finding which we do not make) such influence would have been completely dissipated and neutralized by his resignation, and therefore, he

12. 161 NLRB 852, 854-855.

could certainly not have improperly influenced the employees in their concerted decision to go out on strike on February 15.

Our colleagues, on the other hand, find that a bargaining order is not warranted under the principle's enunciated in *Gissel*,[13] since the Respondent's unfair labor practices here were not such as would preclude the holding of a fair election, and that, therefore, this case raises the very issues which the Supreme Court expressly left unanswered in *Gissel*:[14]

Whether, absent election interference, an employer who insists upon an election must initiate the election by his own petition. We fail to perceive how the facts of this case put that question squarely in issue here. For, the record clearly establishes that the employer did not insist upon an election, or even want an election. Nor was the employer's refusal to bargain at any time based upon an asserted doubt of majority or any other issue resolvable through an election. To the contrary, the Respondent had knowledge, independently of the authorization cards, that a majority of its employees supported the Union and not only refused to bargain because of considerations extraneous to the Union's majority, but expressly and completely rejected the idea of going to an election by aggressively announcing that it would not bargain even if the Union were certified pursuant to a Board election. This assertion directly caused the Union to withdraw its petition as a wholly futile route for resolving any question of majority status and, in our view, tainted the possibility of holding a fair and meaningful election. As the operative facts herein are undisputed, the majority opinion raises and resolves issues not germane to this case.

13. *N. L. R. B.* v. *Gissel Packing Company, Inc.*, 395 U. S. 575.

14. Because the employer's refusal to bargain in *Gissel* was accompanied by independent unfair labor practices tending to preclude the holding of a fair election, the Supreme Court said: ". . . we need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes." *Supra*, 595; see also p. 601, fn. 18, set forth in text of majority opinion.

What disturbs us more, however, is that the majority's resolution of the foregoing issue ignores the guidelines provided in *Gissel, supra*, and overrules, without specifically so stating, our recent decision in *Wilder*[15] which followed those guidelines in resolving that same issue. To the extent relevant here, the Supreme Court's *Gissel* opinion, aside from its specific holdings, is noteworthy in that: (1) it expressly reaffirms the historical interpretation of the Act with respect to an employer's bargaining obligation under Section 8(a)(5) whenever the union presents "convincing evidence of majority support" and the propriety of establishing such obligation by means other than a Board-conducted election;[16] and (2) it rejects the contention

15. *Wilder Mfg. Co., Inc.*, 185 NLRB No. 76.

16. In discussing whether a union can establish a bargaining obligation by means other than a Board election, the Supreme Court said:

> A union is not limited to a Board election, however, for, in addition to § 9, the present Act provides in § 8(a)(5) . . . that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Since § 9(a) . . . refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, *it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support."* Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of § 8(a)(5)—by showing convincing support, for instance, by a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes. [Footnotes omitted.] [Emphasis supplied].

We have consistently accepted this interpretation of the Wagner Act and the present Act, particularly as to the use of authorization cards. . . . Thus . . . we . . . pointed out in [*United Mine Workers* v. *Arkansas Flooring Co.*, 351 U. S. 62 (1956)], where the union had obtained signed authorization cards from a majority of the employees, that "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the em-

that Section 9(c)(1)(B) of the Act gives employers an absolute right to an election at any time and finds, instead, that subparagraph (B) of Section 9(c)(1) was enacted to allow an employer, after being asked to bargain by a union claiming to represent a majority of his employees, to test out his doubts as to the union's majority.[17]

The Board adhered to these principles in *Wilder, supra.* Although the employer's refusal to bargain in that case was not accompanied by independent unfair labor practices, the Board nevertheless held that a bargaining order was appropriate, because the record contained substantial evidence, in addition to the signed authorization cards, to demonstrate the employer's knowledge of majority status, and no evidence demonstrating the employer's willingness or desire to resolve any doubts which it may have entertained through the election process.[18] That decision, in our opinion, is sound law and reflects long-established principles which the Supreme Court reaffirmed in *Gissel, supra.* The majority, on the other hand, would now

ployer's denial of recognition of the union would have violated § 8(a)(5) of the Act." 351 U. S., at 69. We see no reason to reject this approach to bargaining obligations now. . . . [*Gissel, supra,* 596-598.]

17. The Court, at page 600, expressly "agree[d] that the policies reflected in Section 9(c)(1)(B) fully support the Board's present administration of the Act (see *supra,* at 591-592)." This latter reference is to the Court's summation of the Board's current practice, to wit:

> When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, *unless he has knowledge independently of the cards that the union has a majority,* decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself under § 9(c)(1)(B). [Emphasis supplied.] *Gissel, supra,* 591.

18. The Board based its findings of employer knowledge upon the fact that all 11 of the 18 unit employees who had signed authorization cards "dramatically evidenced their support for the Union by actively participating in a picket line and a strike" and the employer's concession that it knew that 10 or 11 employees in the unit supported the union. *Wilder, supra.*

quietly overrule *Wilder* and find that, except for an election, a bargaining obligation under Section 8(a)(5) may be established only in situations such as prevailed in *Snow & Sons,*[19] where the employer having agreed to abide by the results of a private poll of his employees, subsequently reneged on that agreement when the poll confirmed the union's claim of majority.[20] We cannot accept this limited approach to determining an employer's bargaining obligation as we believe it is contrary to well-established law. It is significant that the Supreme Court, in *Gissel, supra,* expressly cited union-called strikes or strike votes as examples of "convincing evidence of majority support" upon which a union may rely to invoke a bargaining obligation under Section 8(a)(5).

In view of all the foregoing, we would find that the Respondent's refusal to bargain with the Union on and after February 8, 1967, violated Section 8(a)(5) of the Act and that, in all of the circumstances, a bargaining order is clearly warranted.

JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
NATIONAL LABOR RELATIONS BOARD

19. *Snow & Sons,* 134 NLRB 709, enfd. 308 F. 2d 687 (C. A. 9).

20. Indeed, in our view, this case is not unlike *Snow & Sons, supra,* since the Respondent had agreed to go to a consent election if the Union submitted a "fresh" 30-per cent showing of interest, and thereafter reneged on its promise when the Union submitted such showing which indicated that a clear majority supported the Union.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discourage membership in or activity on behalf of Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization by discriminatorily failing or refusing to reinstate any of our employees or by discriminating in any other manner in regard to hire or tenure of employment or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority and other rights and privileges.

WE WILL make the said Marsh and Alexander whole for any loss of pay suffered as a result of refusing to reinstate them.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named Union or any other labor organization.

LINDEN LUMBER DIVISION, SUMMER & CO.
(Employer)

Dated ..... By .....
(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513—684-3686.

APPENDIX G

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

IVAR H. PETERSON, Trial Examiner: Upon separate charges filed by Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued complaints which on July 31, 1967[1] were consolidated for hearing, against Linden Lumber Division, Summer & Co., herein called the Respondent. Briefly stated, the complaints alleged that the Respondent had unlawfully refused to bargain with the Union, thereby causing an unfair labor practice strike, and that it had discriminatorily refused to reinstate two employees, all in violation of Section 8(a)(5), (3), and (1) of the Act. The Respondent answered, admitting certain allegations but denying the commission of any unfair labor practices; by way of affirmative defense, it alleged in substance that the Union was formed by supervisors of the Respondent and was not, therefore, entitled to recognition. As to the alleged discrimination against two employees, it averred that one, Richard Marsh, was a supervisor who "established and dominated" the Union and as to Richard L. Alexander, that he "participated in an act of violence against two customers of Respondent during the strike" and in consequence was not entitled to reinstatement.

Pursuant to notice, I heard the case in Columbus, Ohio, on October 3 and 4. All parties were represented and were afforded full opportunity to participate in the hearing. Briefs filed by each of the parties have been considered.

1. Unless otherwise indicated, all dates refer to the year 1967. The charges in Case 9-CA-4197 were filed February 23 and the complaint issued May 24; in Case 9-CA-4283 charges were filed on May 25 and the complaint issued on July 31; and in Case 9-CA-4309 the charges were filed on June 8 and the complaint issued on July 31.

Upon the entire record in the case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is an Ohio corporation engaged in the manufacture of prefabricated homes and the sale of lumber products at its plant in Columbus, Ohio. It annually has a direct inflow of products valued in excess of $50,000 which it obtains from points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

On December 28, 1966, William Martin, an employee of the Respondent, called Dow Norman, business agent and organizer of the Union, advising that the Respondent's employees desired to join the Union and have it act as their collective-bargaining representative. As a result of this call, 12 employees, including Marsh and Alexander, the alleged discriminatees, attended a meeting with Norman on December 29, 1966, at a restaurant in Columbus. All signed authorization cards on behalf of the Union.

On January 3, Mit Duncan, Secretary-Treasurer of the Union, wrote to the Respondent, attention William Riley, general manager, stating that the Union had been designated as the collective-bargaining representative by a majority of the Respondent's "truck drivers, warehousemen, production workers, maintenance men and yard men." He demanded that the Respondent recognize the Union as "the agent for collective bargaining for these employees." The Respondent replied on January 6, stating that it did not "believe that your Union does represent a majority," declining to grant recognition, and suggesting that the Union petition the Board for an election as that procedure "is the proper way to determine such questions."

In the meantime, on January 5, the Union did file a petition for a representation election (Case 9-RC-7096), describing the appropriate unit as consisting of "All truck drivers, warehousemen, production workers, maintenance men and yard men," excluding "office, clerical, supervisory and professional employees, guard, watchmen and all others excluded by the Act." In response to the Regional Director's request for a list of employees "falling within the alleged appropriate unit," the Respondent replied on January 9, attaching a "list of employees who perform duties in the general classifications listed in the petition."[2]

A representation hearing on the Union's petition was scheduled for February 3. When the parties met for the hearing, the Union was represented by Victor Smedstad, attorney; Business Agent Norman; and employees Marsh and Shafer. The Respondent was represented by Harvey Rector, labor consultant; General Manager Riley; Dispatcher Robert Dupree; Yard Foreman Roy Toops; and employees William Lynch and William Mason. At the outset of the representation proceeding, and before the Hearing Officer formally opened the hearing, Mr.

2. Included in the list of names, 15 in number, were Marsh and Alexander, as well as Henry Shafer and Roy Toops. At the hearing the parties stipulated that Toops was a supervisor; the Respondent asserted that both Marsh and Shafer were also supervisors.

Rector and Attorney Smedstad, together with the hearing officer, engaged in a discussion, following which the Union signed a request to withdraw its petition.

In this proceeding, Attorney Smedstad testified in some detail regarding this discussion, and, although other witnesses (Norman, Marsh, and Riley) also testified concerning this episode, their accounts do not materially vary from that of Smedstad. I accept Smedstad's testimony, principally on the ground that it is not contradicted and because he impressed me as the more likely, in view of his legal training and experience, to understand the somewhat technical aspects of the discussion. The findings which next follow are based upon his version.

Mr. Smedstad inquired of Mr. Rector if there was any possibility of entering into a consent election agreement. Rector replied there was not. The Hearing Officer then asked Rector whether he would stipulate that the Union was a labor organization within the meaning of the Act, and Rector replied he could not so stipulate, because, he said, the Union had been organized by supervisors of the Company and it would, therefore, be unlawful for the Company "to recognize any union that had been organized by supervisors." After some further discussion Rector agreed that the Union, as such, was a labor organization within the meaning of the Act, but stated that he wanted "to go on the record and make a record on the way in which this union was organized" and to show that "supervisors . . . coerced some of the employees into signing cards." Mr. Jack Baker, the Hearing Officer, then stated that the Union's showing of interest was not a matter to be litigated in the representation proceeding. The following exchange then occurred, as related by Smedstad:

> . . . Mr. Rector said, "You mean you are denying me the right to make a record, to have a record?" And Mr. Baker said, "Well, on this issue of how the union got its showing of interest, I will not hear this evidence."
>
> Mr. Rector said, "Well, if you are going to deny me the right of the record on this, then the Board can do what

it wants to. If it holds an election, the company will not bargain with the union."

Mr. Smedstad thereupon obtained a recess and discussed the situation with officials of the Union. Returning to the hearing room, he asked the Hearing Officer for a withdrawal form. This was signed by Smedstad, without objection from Mr. Rector. Later, before leaving the hearing room, Smedstad and Rector had a conversation, the substance of which was that under no circumstances would Rector enter into a consent election agreement, even if the Union obtained a new showing of interest, saying that "it was through the action of supervisors that they [the employees] signed up, and, therefore, we will not sit down and bargain with you."[3]

B. *The Refusal to Bargain and the Strike*

1. The Union's majority

Immediately following the conclusion of the February 3 meeting, Smedstad and Norman went to the Union's hall, where Smedstad drafted three documents: a recognition agreement which contained a clause whereby the Union agreed to refer to the Board the unit status of such persons as the parties could not agree were or were not supervisors; a document for employees to sign, stating, in part, that they wished the Union to represent them and that each "has voluntarily attended the meeting at which this is being signed" and each "has voluntarily signed" and "believes the company would not want us to join Truck Drivers Union, Local No. 413", and concluding with a request that the Respondent recognize and bargain with the Union while the employee and unit status of Marsh and Shafer was being determined by the Board (G. C. Exhibits 8, 9, and 10).

Norman called a meeting of the employees on February 4, at the union hall. Eleven employees attended, including Marsh

3. Rector did not testify.

and Shafer. Norman informed the employees of what had transpired at the scheduled hearing the day before and distributed copies of the three documents prepared by Smedstad to nine of those present, but not to Marsh or Shafer, stating that because their employee status was in question they could not participate in the meeting in any manner. All nine remaining employees, excluding Marsh and Shafer, signed the statement expressing their voluntary desire to be represented by the Union.

On February 6, Business Agent Norman took the documents referred to above to the Respondent's plant, and presented them to General Manager Riley. Norman credibly testified that, after showing the papers to Riley, the latter said he would refer the matter to Rector. Under date of February 8 Rector wrote to Norman, stating that the Respondent "refuses to recognize your union as bargaining agent because your membership includes supervisors . . . who influenced and dominated employees of the proposed unit." He added that for the Respondent to extend recognition "would be in violation of Section 8(a)(2) of the Act, because any signatures you may have obtained under this [supervisory] influence would not be legal." He further stated that "if there is a strike, at this time, both your union and the supervisors in question will be liable to suit for damages."

At the December 29 meeting 12 employees (assuming for present purposes that Marsh and Shafer are not supervisors) signed union authorization cards which were properly authenticated at the hearing by Norman.[4] At the February 4 meeting nine employees signed the document prepared by Smedstad acknowledging that they voluntarily desired the Union to represent them.[5]

4. These were: Richard Alexander, Frederick Baum, Homer R. Beckelheimer, Melvin Brice, Roy L. Hamilton, Gilbert Kountz, Norman LeVeck, Richard Marsh, Bill A. Martin, Floyd Ross, Henry Shafer, and John W. Thompson.

5. The employees signing were: Alexander, Beckelheimer, Brice, Hamilton, Kountz, LeVeck, Martin, Ross, and Thompson.

The complaint (Case 9-CA-4197) alleged, and the Respondent's answer admitted, that the following unit is appropriate within the meaning of Section 9(b) of the Act:

> All truck drivers, warehousemen, production and maintenance employees and yard men at Respondent's facility at 1850 Dunune Avenue, Columbus, Ohio, excluding office clerical employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The parties stipulated that at all times material there were 10 employees in this unit.[6]

I find that at all times material the Union represented a majority in the appropriate unit.

2. The employee status of Marsh and Shafer

a. *Marsh*

Marsh was first employed by the Respondent as a truckdriver for approximately 3 years; in February 1965, he began working as a truss maker in the truss department. While employed in that capacity, he also drove a truck, operated a forklift, worked in the yard, and unloaded boxcars. He generally reported to work at 7:30 a.m. and punched the timeclock. According to Marsh's credited testimony, he spent an average of 90 percent of his time in the actual construction of trusses, while the balance of his working time was devoted to setting up jogs and other duties as set out above. He, as well as LeVeck, answered the telephone and quoted prices to customers from detailed price lists made available to them.

6. They further agreed that Toops was a supervisor. General Counsel contended that Marsh was nonsupervisory and therefore a member of the unit, whereas the Respondent contended that he was supervisory. With respect to Shafer, the Union took no position as to his unit status, the General Counsel reserved his position, while the Respondent contended Shafer was "mill superintendent." Counsel for the Respondent further stated Beckelheimer "became foreman in Shafer's place when Shafer resigned on February 6."

I credit Marsh's testimony that he was never advised by anyone in management that he had any supervisory authority as defined in Section 2(11) of the Act.[7]

The Respondent called several general contractors—William B. Luft, Walter Webb, and Joseph Betts—who testified to the effect that they (the general contractors) had been introduced to Marsh by members of Respondent's management, as the truss superintendent. Aside from the fact that some of their testimony, which need not here be detailed, did not impress me as worthy of credit, it is plain that the title conferred upon Marsh by his superiors when the latter introduced him to customers of the Respondent as the superintendent of the truss department, is entitled to little if any weight in determining his status.

Upon all the above I find that Marsh did not possess or exercise supervisory authority at any times here relevant. Accordingly I find he is to be included in the unit.[8]

7. General Manager Riley testified, in conclusionary terms, to the effect that Marsh was a supervisor. However, he admitted that Marsh had never been carried on any company records, such as the payroll records, as having a supervisory title, and that no notice was ever posted informing any of the Respondent's admitted nonsupervisory employees of Marsh's alleged supervisory status. William Dunfee, assistant manager, testified that he informed Marsh in March 1965, that he was truss superintendent as the successor of one John Phillips who had formerly been the truss superintendent and whom Marsh replaced. When Phillips held this position, he was paid a salary of $135 or $150 per week. When Marsh allegedly became truss superintendent he was then receiving an hourly rate of $2 and did not receive an increase in pay at that time. Later in the year, Marsh received an increase. When he last worked for the Respondent, he was being paid $2.30 per hour, plus time and one-half for work in excess of 40 hours per week.

The objective facts, the conclusionary nature of Riley's testimony and the admissions made by him and the obviously evasive demeanor of both Riley and Dunfee, convince me that they are not entitled to be credited unless their testimony is corroborated by reliable and creditable oral testimony or written documents.

8. See *N. L. R. B.* v. *Leland-Gifford Co.*, 200 F. 2d 620, 625 (C. A. 1), where the court observed: "Certainly it cannot be that an employer can make a 'supervisor' out of a rank-and-file

b. *Shafer*

As noted above, Shafer resigned on February 6, 1965. It is, therefore, unnecessary for the purpose of this proceeding to determine whether or not he occupied a supervisory position. In any case, the evidence is inconclusive.

3. The strike and its nature

As found above, the Union was the majority representative of the employees in the appropriate unit at all times here material. Paragraph 8 of the complaint (Case 9-CA-4197), alleged that the Union requested and thereafter continued to request, following February 6, that the Respondent bargain collectively with it. Paragraph 9 alleged that on or about February 8, and at all times thereafter, the Respondent refused and has continued to refuse to recognize and bargain in good faith with the Union by (a) refusing to grant recognition to it as the exclusive bargaining representative of the unit employees, and (b) refusing to meet with the Union to discuss rates of pay, wages, and other terms and conditions of employment. Paragraph 10 alleged that on February 15, "certain employees of Respondent employed in the said unit . . . ceased

employee simply by giving such an individual a title and theoretical power to perform some or all of the supervisory functions listed" in Section 2(11) of the Act. See also *Quincy Steel Casting Co., Inc.*, v. *N. L. R. B.*, 200 F. 2d 293-297 (C. A. 1), where the same court said that "the important thing is the actual duties and the authority of the employee, not his formal title." (Citing *Red Star Express Lines* v. *N. L. R. B.* 196 F. 2d 78, 79-80 (C. A. 2).) In reaching the above conclusions regarding Marsh's status, I have carefully considered the testimony of management representatives and the manager of Nugents-American Contractors, which organization on occasion supplies temporary labor to the Respondent, and Marsh's testimony about the manner in which he was involved in such procurement of temporary labor. I credit Marsh's testimony in this regard, and that of Mr. Dove, who in answer to a question on cross-examination by Counsel for the General Counsel, whether orders for temporary help "have also been signed by other employees of Linden Lumber other than Richard Marsh?" answered "Right."

work concertedly and went out on strike"; and paragraph 11 alleged that the strike described above "was caused and prolonged by the unfair labor practices of Respondent" previously described in paragraphs 5 and 9.

In its answer to this complaint the Respondent denied the pertinent paragraphs "for the good and following reasons": (a) with respect to the representation hearing, previously referred to, it was the Respondent's contention "that it could not legally recognize a union comprised of supervisors"; (b) it further stated that the claim of majority status was "based on the allegation that 4 employees, led by three supervisors, constitutes the majority of the employees of the respondent." The answer further alleged that no union "is the exclusive bargaining agent for the employees of respondent," and that the Union "requested recognition by sending the company a list of names which included a supervisor." Finally, the Respondent alleged that Region 9 of the Board "has made it clear that the respondent must bargain regardless of the supervisory issue."[9]

9. The Respondent, in the concluding paragraph of its answer in Case 9-CA-4197, alleged that it "has never refused to bargain with a legally constituted and designated or certified unit of its employees. Respondent does refuse to recognize its supervisors as union representatives because such a union or unit thereof would be contrary to law." In support of this affirmative defense the Respondent cites *Wells, Inc.*, 68 NLRB 545 (1946), in which the Board dismissed an allegation of violation of Section 8(5) of the Wagner Act on the ground that "the Union's majority was procured with the direct and open assistance of a supervisory employee" and thus did not "represent the free and untrammeled will of the employees and hence cannot be recognized as [a] valid majority." The Court of Appeals for the Ninth Circuit enforced the Board's order, *Wells, Inc.* v. *N. L. R. B.*, 162 F. 2d 457, but modified the portion thereof requiring the reinstatement of the foreman, found by the Board to have been discriminatorily discharged, who had been responsible for the recruitment of his subordinate employees into the union. In addition, the Respondent cites *Jack Smith Beverages, Inc.*, 94 NLRB 1401, where the Board ordered the disestablishment of an affiliated union which it found to have been supported and dominated by the employer, in violation of Section 8(a)(2) of the Act; and *N. L. R. B.* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 271 (C. A. 6), where the Court, following remand from the Supreme Court of the United States (332 U. S. 840), modified its prior order en-

As found above, Marsh is not a supervisor and, accordingly, is entitled to be and is included in the appropriate unit. The status of Shafer need not be passed upon for the purpose of this proceeding, inasmuch as he terminated his employment on February 6, and, in any event, his inclusion or exclusion could not affect the result.

Under date of February 8, Mr. Rector, the Respondent's labor consultant, replied to Norman's request for recognition which had been delivered to Rector on February 6, as follows:

> The company refuses to recognize your union as bargaining agent because your membership includes supervisors . . . who influenced and dominated employees of the proposed unit. This position was made clear by the company at the NLRB hearing February 3, 1967 in Case 9-RC-7096. Your union had the opportunity to prove its claims before NLRB but withdrew its petetion *(sic)*. Therefore, the company can not recognize your union so long as the supervisory influence exists. To do so would be in violation of Section 8(a)(2) of the Act.

Rector's answer to Norman's request continued that it was his understanding from the Company that the Union "threatened to strike." He added that "if there is a strike, at this time, both your union and the supervisors in question will be liable to suit for damages." Concluding, Rector stated that the Board "should decide this matter" but, in view of the fact that the Union had withdrawn its petition, the "NLRB is powerless to rule."

Attorney Smedstad, whose testimony I credit, gave the following answers to the questions on cross-examination by Mr. Rector:

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forcing an order of the Board, issued prior to the 1947 amendment of the Act, so as to set aside (in agreement with the Board's contention) those provisions of the previously enforced order of the Board directing the employer there involved to cease and desist from discouraging membership in the Foreman's Association of America, in any other manner interfering with its supervisory employees' efforts to bargain collectively through that organization, and to post appropriate notices with respect to these matters.

> Q. I have one question. Is it your testimony then that you actually withdrew the petition because you did not want to go through a long, lengthy litigation before the Board?
>
> A. Before the Board and before the Court of Appeals which would, from my experience, take a good two years or better.
>
> Q. I daresay, you are right; but that is the reason you withdrew your petition?
>
> A. That is correct.
>
> Mr. Rector: Thank you. No further question.
>
> Trial Examiner: You are excused, Mr. Smedstad.

Concerning the conference between Attorney Smedstad and the employees and Norman prior to the conclusion of the representation proceeding, Smedstad credibly testified that he advised the employees and Norman that "regardless of how it [the representation proceeding] turns out, it will be two years in all likelihood before you can sit down and bargain with this company. There is a possibility that through economic action, in the way of a strike, the company might be willing to sit down and bargain, without having to go through any election." His further testimony, which I credit, is that the employees and Norman, the union representative, told him that "it was their opinion that the employees were so highly irritated because of the manner in which the company was being run and the working conditions that all they would have to do would be to drop a nickel in the phone box and they would be out on the street right then and there." Smedstad thereupon told the union representatives and employees that it was necessary for them to stick together, and that if they felt the way they expressed themselves, he would ask the union president for authority to withdraw the petition. He then telephoned the union office and talked to Dale Mann, president of the Union, recited to him what the problem appeared to be, and received full authority to withdraw the petition if he deemed that action advisable.

At the subsequent private conference between Smedstad and Rector, the latter, according to Smedstad's credited testimony, referred to the fact that he had known Robert C. Knee, the attorney with whom Mr. Smedstad was associated, for a good many years. Rector further added, again according to Smedstad's credited testimony, that it had been the policy of his organization "that whenever the union has a 30 percent showing of interest that we are more than happy to enter into a consent agreement." Smedstad replied that he could assure Respondent that the Union had "well over 30 percent" in this situation, to which Rector retorted that it was his understanding from his investigation "that some supervisors have coerced some employees into signing cards." Smedstad rejoined that it was his understanding, as indicated by the exhibits to which reference has heretofore been made, that when the petition in the representation case was first filed, the Respondent submitted a list of 14 names to the Regional Office and advised that if the Union would agree to this list the Company would be willing to go through a consent election. To this, Mr. Rector rejoined: "Yes, that's when they didn't know what they were doing, and when I came in on the case, when I looked at that list, I found that the list was not correct. For example, there was one individual who was no longer working at the plant . . ." and "I understand that one or two people on here are supervisors."

Respondent's brief to the Trial Examiner consists of some four pages of argument, in which the following issues are raised:

1. Did the Hearing Officer deliberately refuse to go on the record so that Counsel for the Union would have grounds to file the unfair labor practice charge?
2. Why did the Union withdraw its petition?
3. Why did the Regional Director permit the withdrawal?
4. Why did the Hearing Officer refuse to go on the record?

The brief asserts that all of the testimony contained in the record creates a controversy "which was established by one fact only—the Hearing Officer denied the respondent benefit of record. In so denying the respondent his rights under the law, he set up a 'make weight' reason for the General Counsel, based upon a charge by the union, to issue a complaint seeking to force the respondent to bargain with said union without an election or due process of law. If the General Counsel is right and the statement of Rector is an unfair labor practice then the combined actions and conduct of the Hearing Officer, Counsel for the Union and the General Counsel constitute a conspiracy to defraud the respondent."[10]

I conclude that the evidence in this proceeding clearly establishes that the strike was caused by the unfair labor practices of the Respondent in refusing to recognize the Union and by its other unfair labor practices as above described. I find no merit whatever in the contention that the unit of employees (or the Union for that matter) was dominated by supervisors of the Respondent. By refusing to recognize and bargain with the Union as the exclusive representative of its employees, I find that the Respondent violated Sections 8(a)(5) and (1) of the Act, and that the strike which began February 15, was caused by the Respondent's unfair labor practices.

The parties agreed that the strike terminated on June 1, and all employees who desired to return to work were reemployed, with the exception of Marsh and Alexander. We turn then to the alleged individual discrimination against Marsh and Alexander.

10. While it seems unnecessary to make any comment upon these arguments, it may not be inappropriate to note that they are specious and, for the most part, the citations in support thereof are distinguishable or wholly inapposite.

C. *The Discrimination Against Marsh and Alexander*

1. Marsh

When the strike commenced on February 15, Marsh did not join in it for the reason that Norman had informed him that his status as an employee was still in question and, consequently, advised Marsh to continue working. Marsh did work until February 27 and then told General Manager Riley that the other employees who were working would not talk to him, and were giving him "dirty looks" and that one employee, Donald Alexander, was riding around with a German Shepherd dog in his truck. In consequence, Marsh told Riley that he did not think it was safe for him to continue working and that he had concluded he should go home. In response to Marsh's statement, Riley in substance stated that Marsh was "quitting"; Marsh, however, replied that he was "just going home until this union situation is straightened around to where I felt I was safe in the truss plant." Approximately a month later (about the latter part of March) Marsh returned to the plant and told Riley that, since matters seemed to have quieted down, he was ready to return to work. At this point I find, in accordance with the credited testimony of Marsh, that Riley told him he (Marsh) had quit.[11]

I find that Marsh did not quit on February 27, but, with Riley's consent, absented himself from work because of the conditions then prevailing. Moreover, I conclude that Marsh was, as an employee, a supporter of the strike from its inception, but, on advice of his union representative remained at work between February 15 and February 27. I further conclude and find that when Marsh, during the latter part of March, informed Riley that he was prepared to resume working inasmuch as the strike activities had apparently quieted down, Riley informed him that

11. A careful check of Riley's testimony reveals no denial by him of the foregoing testimony of Marsh.

he had quit, and, in effect, discharged him because he was sympathetic with the Union's cause.

Accordingly I find that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to permit Marsh to return to work when he offered to do so in the latter part of March. Moreover, I am persuaded and find that Marsh became an unfair labor practice striker when he ceased working on February 27.

2. Alexander

It is not disputed that Alexander, who was employed by the Respondent in August 1965, was at all times here material an employee of the Respondent and that he went on strike February 15 and continued to participate in it. About the end of May he applied, in company with other strikers, for reinstatement. General Manager Riley, under date of June 2, wrote the following letter to Alexander:

> We regret to inform you that we are unable to reinstate you in your job because of your participation in violence during the course of the strike.

Without undue lengthening of this Decision, I find, upon the basis of the testimony from the proceeding before me and the related testimony in the official record in the criminal proceeding brought against Alexander (which resulted in his acquittal) that the Respondent's defense with respect to Alexander is without merit.

Admittedly, Alexander was arrested during the strike and charged with assault. The matter came on for trial June 13, before the Municipal Court of Columbus, Ohio. By stipulation of the parties, the testimony of one Walter Lucas, one of the complaining witnesses against Alexander, as contained in the official transcript of the criminal proceeding brought against Alexander, was received in evidence as "a true, accurate and

correct copy of the transcript" of those proceedings.[12] Alexander was acquitted of the assault and battery charges brought by Lucas as well as by one Robert Smith, both of whom testified in the proceeding before me as witnesses for the Respondent. Riley, who wrote the June 2 letter to Alexander, refusing him reinstatement because of his alleged "participation in violence during the course of the strike," was not examined with respect to the basis of his knowledge of the assertion made in that letter.[13]

The incident upon which the Respondent relies for not reinstating Alexander occurred on Saturday, February 25. During the preceding week, as Alexander credibly testified, Smith "was blocking our picket line and started calling us names . . . and pulled off his coat and was going to fight," but that he never had any trouble with Lucas prior to February 25.

Smith and Lucas, both employees of Stoner Lumber Company, appeared at the Respondent's plant about noon on February 25, and, according to Smith's testimony on direct examination as a witness for the Respondent, the following occurred:

> Q. Could you explain what happened while you were out there?
>
> A. Well, we were sent out to pick up a forklift and, in the meantime, they were still using it, around noon, so we went on over to the Tip-Top to wait until they got finished.

12. Rector's objection that the transcript had "no bearing upon this case" was overruled; in support of his objection he characterized the transcript of the Municipal Court proceeding as "a civil court transcript or record of the testimony that was taken" and added that the June 2 letter to Alexander was based upon "the information that reached the employer that he [Alexander] was involved in it [the fracas]" and "that he was refused" reinstatement for that reason.

13. The Respondent produced as witnesses in support of the Respondent's refusal to reinstate Alexander, only the witnesses Lucas and Smith. Their testimony not only does not establish that they gave any information about the "fracas" to Riley, but for reasons briefly stated hereafter, I do not credit their testimony implicating Alexander.

Q. By "we," who do you mean?
A. Me and Mr. Lucas.
Q. Okay, continue. What happened then?
A. Well, we went into the Tip-Top Club—
Trial Examiner: You went in where?
The Witness: The Tip-Top Club, 3-C Highway. We had us a drink in there, when these fellows all came in and jumped us.
After that, we proceeded to go back and get the forklift and took it back to the Stoner Lumber Company.
Q. What happened then at the Tip-Top?
A. There were six or seven fellows came in and jumped us, and beat us up pretty good, and after that we went on back over to the lumber company. They called the police.
Q. You say six or seven fellows jumped you?
A. That's right.
Q. Did you recognize any of them?
A. Just two of them.
Q. And who were the two you recognized?
A. Richard Alexander and Bill Martin, William Martin.
Q. Did they strike any blows?
A. Yes, they did.
Q. Now, were these two, Alexander and Martin, arrested?
A. Well, we filed charges against them. They were arrested, yes, sir.
Q. And did you have a trial?
A. Yes.
Q. In court?
A. Yes, we did.

On cross-examination, Smith testified as follows:

Q. Did you testify at the trial on the charges brought against Richard Alexander, by both you and Mr. Lucas?
A. Yes, I did.
Q. Were the charges which were brought against Mr. Alexander—Based on those charges, was he found not guilty?

A. I believe they found him not guilty.

Q. And do you know from your own knowledge that the charges Mr. Lucas brought against Mr. Alexander were also dismissed?

A. As far as I know.

Lucas, also a witness for the Respondent, testified on direct examination as follows:

Q. Were you out at the Linden Lumber Company during the strike?

A. Yes, sir.

Q. Could you tell us what happened?

A. Well, they sent me with Bob Smith, the forklift operator, out there to haul this thing down to our yard. There was a lot of shuffling going on out there. They couldn't get the trailer loaded right away. They were busy doing something else, so we walked over to the tavern and we had a highball, and we were sitting there drinking and talking and discussing things. We were close to the front door and this group of guys come in.

Well, naturally, we turned. I never thought anything about it. They walked by us, and we kept on talking. Suddenly, there was a fracas and they had Bob on the floor, and Martin and Alexander were beating him and two other guys were there close, and I stood up. Bob got away from them. They were going toward the back door and I turned to see what had happened, and someone struck me in the back of the head with something. It left three cuts in the back of my head.

When I turned around, there were these fellows standing there, and somebody hit me in the ear, and I saw this one big fellow that I had seen on the sidewalk there with the rest of them fellows. He was coming at me, and I pulled my pocketknife out and told him that if he struck me I was going to use it on him, and someone hollered, "He's got a knife, let's go," and that's all. They left.

Q. Was that, then the end of the fight?

A. Yes, sir.

Trial Examiner: What did you do next?

The Witness: We went out the back door, the way we went in.

Trial Examiner: Then where did you go?

The Witness: Over to the Linden Lumber Company.

Trial Examiner: And got the forklift?

The Witness: Yes, sir. Well, we got the forklift and took it back to our yard. Of course, they called the police.

Trial Examiner: Who called the police?

The Witness: Someone at Linden Lumber. I don't know who did. The cruiser came up and took a report on what happened. We took the forklift back to our yard, and our boss took us down to the hospital and to the police department to file assault and battery charges against Alexander and Martin, that's the only ones I knew.

Trial Examiner: You had known Alexander and Martin?

The Witness: I didn't know them real well. I had seen them in the line-up, walking along the sidewalk.

Trial Examiner: You had been out to the Linden Lumber Company before this Saturday morning during the strike?

The Witness: I don't remember if I had been in there or not, before that, during the strike.

Q. Now, then, were you down at the court hearing on these charges?

A. Yes, sir.

Q. And did you testify?

A. Yes, sir.

Q. Did you know Melvin Bice?

A. Yes, sir, by acquaintance and seeing him during the strike. I don't know him personally.

Q. Did you observe him down at the court house?

A. Yes, sir.

Q. Was he in the Tip-Top when this assault went on?

A. No, sir.

On cross-examination, Lucas testified, in pertinent part, as follows:

Q. Now, you say, Mr. Lucas, that you testified. Was this relative to the assault and battery charges you filed against Mr. Alexander?

A. Yes.

Q. Mr. Lucas, do you personally know Mr. Alexander?

A. No, sir.

Q. Had you, prior to going into the Tip-Top Cafe on the day of the altercation, prior to that time seen Mr. Alexander?

A. Yes, sir.

Q. Where had you seen Mr. Alexander?

A. On the sidewalk . . . at the Linden Lumber Company.

Q. You were not really sure who it was that hit Mr. Smith and knocked him down?

A. That is right.

Q. You are not sure?

A. I seen Alexander and Martin beating on him after I turned around and saw him on the floor.

Q. How many guys were on top of Mr. Smith?

A. Martin, Alexander, and two other fellows were there close. I don't know if they had been or not, it all happened in a flash.

Q. You didn't know who had knocked Mr. Smith down?

A. I know Alexander and Martin were beating on him then.

Q. You don't know who had knocked Mr. Smith down?

A. I don't know who knocked him off the stool.

Q. Mr. Lucas, didn't you testify at the hearing on the assault and battery charges that you only recognized one of the fellows who was hitting Mr. Smith while Mr. Smith was on the floor?

A. I don't remember that.

Q. You don't remember testifying in that manner?

A. No.

Q. Isn't it a fact that you only recognized one of the fellows that was hitting Smith, and that was Martin, Bill Martin?

A. No, it isn't.

Mr. Smedstad: I have some questions.

Q. Mr. Lucas, you testified here that you cannot swear that it was Mr. Alexander that hit you, is that right?

A. That's right. I was hit from the back.

Q. And at the hearing that was held on the assault charges that you brought, isn't it correct that on examination from at least two different attorneys that you testified that you did not know whether or not it was Alexander? Isn't that correct?

A. I think probably.

Q. Were you under oath at that hearing?

A. Yes.

Q. And under oath you testified that you really didn't know whether it was Alexander or not?

A. I think so.

In the criminal proceeding, brought by Lucas and Smith against Alexander, the following testimony by Lucas is pertinent, in my opinion, relating to his and Smith's visit to the Respondent's premises on February 25:

Q. Did you notice anything unusual about the premises of Linden Lumber Company?

A. I noticed there was a group of guys milling around, yes, sir.

Q. Could you tell what they were doing?

A. Some of them were sitting in cars, some of them just standng around talking.

Q. Notice any signs?

A. At that particular day, no sir.

Q. All right. Did you recognize any of the men there?

A. Yes, sir.

Q. Who did you see?

A. I saw those two fellows there.

Q. Which two fellows?

A. Mr. Martin and Mr. Alexander.

Q. Had you known Mr. Martin and Mr. Alexander prior to that day?

A. Only just to see them around the Linden Lumber Company.

Q. Had you gone there previously?

A. Many times.

Q. Did you know them by name?

A. No, sir.

Q. Did you pick up the forklift at that time?

A. No.

Q. Why didn't you?

A. Well, the yard men were busy unloading the truck, so we backed the trailer into the loading dock and the group of fellows out there cursing and one thing and another—

Q. Cursing?

A. Yes, sir.

Q. Were they cursing at you?

A. I think so.

Q. Do you know why they were cursing at you?

A. I have an idea, because we were there. But we weren't doing any of their work.

Q. You mean it was a labor problem?

A. That's what I think.

Q. Where did you leave the truck?

A. In the Linden's yard.

Q. Where did you go from there?

A. We went over to a grill.

Q. You mean you and Mr. Smith?

A. Yes, sir.

Q. Why did you go over there?

A. Just to get out of their sight. We didn't want to create any disturbance. So, we walked away until the yard men had time to load this lift for us. They said it would be about a half hour or so.

Q. What did you do when you went over to the grill?

A. We got a highball, were sitting there talking.

Q. What happened then?

A. Well, we saw this group of fellows come in the door . . . I'd say from five—four or five—to seven, just a group of guys walking in the door.

Q. Did you recognize any of them?

A. No, sir; I didn't recognize them as their names. I know these two fellows . . .

Q. You mean Mr. Martin and Mr. Alexander?

A. Yes, sir. . . . Well, first thing I knew, they had Mr. Smith on the floor.

Q. How did he get there?

A. This Martin had hit him and another fellow; I don't know the other guy.

Q. What happened after Mr. Smith was struck?

A. I was struck at the back of the head, some instrument or something. I don't think anybody could have done it with their fist.

Q. Do you know who struck you?

A. Mr. Alexander.

Q. What happened then? What did you do?

A. Well, I started—I was dazed. I was trying to get off the stool, and I was struck again here two places. Broke my glasses and burst my ear inside. I had to have it sewed up, eight stitches in the back of my head. . . .

Q. Did you go to the hospital directly from the tavern?

A. No; we took the forklift back to the yard and came to the police station.

Q. In other words, you went back to the Linden Lumber Company?

A. Went back to the Linden Lumber Company; yes, sir.

Q. Did you see Mr. Alexander or Mr. Martin over there?

A. Yes, sir.

Q. Did you have any discussion with them at that time?

A. The police officer got Mr. Alexander and brought him inside, the police sergeant.

Q. Did you call the police?

A. They called them at Linden Lumber, someone I don't know.

Q. You don't know who called the police?

A. No, sir; I think it was probably the president of the company, Mr. Riley.

On cross-examination by counsel for defendants Alexander and Martin in the Municipal Court proceeding, Lucas gave the following testimony:

Q. In your prior trips over to Linden Lumber, did you notice this group of fellows milling around, as you said, around the gates?

A. On a couple occasions; yes, sir . . .

Q. All right. How long have you been driving a truck?

A. Twenty-six years.

Q. In this twenty-six years, how many times would you say that you've been to lumber companies or different places?

A. Oh, gee, that's my job. Every day.

Q. Have you ever seen groups of fellows milling around any places that you'd been before?

A. Yes, sir.

Q. Do you know why they were there?

A. Only what I hear.

Q. What do you generally hear when a group of fellows are standing around?

A. Well, it could be a lot of things.

Q. What?

A. Could be foreman . . . labor dispute; could be a personal grudge against the foreman. . . .

Q. Do you know what a picket line is?

A. I'd say so.

Q. Do you have any instructions on what you're supposed to do when you encounter a picket line?

A. Yes; but this was not a picket line.

Q. Oh, it's not?

A. No. There wasn't no union connected, as far as I know. The company was union, and the men weren't union, as far as I know.

Q. How do you know that?

A. Only what I hear, I say.

Q. Who'd you hear that from?

A. Different fellows; I mean Linden Lumber themselves, representatives of Linden Lumber. And my superiors at Stoner.

Q. So, your superiors told you that this group of fellows weren't a picket line?

A. True.

Q. Did you see Smith pull a knife?

A. No.

Q. Did you pull a knife?

A. Yes.

Q. When did you pull a knife?

A. After I got enough bearings to get on my feet and saw this other guy coming at me.

Q. Who is the other guy?

A. I don't know. He was a big husky fellow. I wouldn't know who he was. I pulled this knife out of my pocket, and I said, "If you hit me one more time, I'll be forced to use it," and I didn't even have it open.

Q. Okay. Now, you said that you were struck from behind.

A. That's right.

Q. Did you see the man strike you from behind.

A. I saw this group of guys come in through the door. When I turned around after the scuffle here, I didn't see this Martin. I mean, Alexander. So, I never saw him hit me, no, but I assumed that it was him . . .

Q. There were anywhere from four to seven guys that could have thrown it?

A. That's right.

Q. You picked Alexander.

A. That's who the man said it was, Mr. Smith.

Q. Well, Smith said that's who hit you?

A. That's true.

On re-cross-examination in that proceeding, Lucas testified:

Q. Did you see Mr. Alexander strike Mr. Smith?

A. No, sir; I can't say that I did.

Q. Did you say the police arrived and then took Mr. Alexander and Mr. Martin down to the police station right then?

A. No, sir; I did not say that.

Q. Do you know when the police took Mr. Martin and Mr. Alexander to the police station?

A. No, sir.

Before me Smith, recalled by the Respondent as a rebuttal witness, testified that he did not have a knife when the altercation occurred at the Tip-Top Cafe. Lucas, on rebuttal, answered to the same effect. He was not then asked whether he had a knife; however, in the Municipal Court proceeding he testified that he had with him, on February 25, "a Boy Scout knife," which he did not open but "had it out of my pocket, though."

Where the testimony of Lucas and Smith, on the one hand, differs from that of Alexander, I credit the latter.[14]

I find that the Respondent had no basis in fact for believing Alexander was a participant in violence to the extent that he is, by reason thereof, barred from reinstatement. Moreover, I find that the reason advanced by the Respondent for refusing him reinstatement is pretextuous and, therefore, violative of Section 8(a)(3) and (1) of the Act.

D. *Concluding Findings of Fact and of Law*

Upon the basis of the foregoing findings of fact I make the following concluding findings and conclusions of law:

1. At all times here material the Union has been and now is the exclusive representative of the employees in the appropriate unit heretofore found.

2. The Respondent by the actions of its representative, Labor Consultant Rector, at the February 3 meeting, and on subsequent occasions as previously found, as well as by the actions of General Manager Riley, unlawfully refused to bargain with the Union as the exclusive representative of its employees in the unit found appropriate, thereby violating Section 8(a)(5) and (1) of the Act.

3. The strike which commenced on February 15, was caused by the aforesaid unfair labor practices of the Respondent.

4. Richard Marsh was at all times here relevant an em-

14. Melvin Bice, a striker who was reemployed and was working for the Respondent at the time of the hearing, credibly testified that he went to the Tip-Top Cafe with Alexander and Martin; that Smith, when Martin "got up and . . . went over . . . to talk to Smith" "jumped up with a knife in his hand and Bill Martin hit him, and they got into a fight." He further testified, and I credit him, that Alexander made no physical contact with either Lucas or Smith. Martin admitted that he hit Smith "a couple or three times" when Smith "turned around with a knife" as Martin "asked him [Smith] to respect our picket line . . . He further testified, and I believe him, that he did not see Alexander attempt to or hit either Smith or Lucas, although he readily admitted that he "was busy" at the time with Smith.

ployee of the Respondent and, when he ceased working on February 27, joined the strike and thereby became an unfair labor practice striker. When he sought to return to work during the latter part of March, the Respondent independently violated Section 8(a)(3) and (1) of the Act by refusing to reinstate him upon the ground, which I find lacking in merit, that he had quit on February 27.

5. I find that, for the reasons heretofore stated, Alexander was refused reinstatement for discriminatory reasons and not because he had allegedly participated in acts of violence during the course of the strike.

6. The aforesaid unfair labor practices are unfair labor practices burdening and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

IV. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, as alleged in the complaint in this consolidated proceeding, I shall recommend that it cease and desist therefrom and take the necessary affirmative action to effectuate the policies of the Act.

Since the Respondent unlawfully refused to reinstate Marsh on February 27 and Alexander on June 1, when all the other strikers were upon application reinstated, it will be recommended that the Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements in order to provide work for them. It will also be recommended that the Respondent make them whole for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, by paying to each of them a sum of money equal to the amount he normally would have earned as wages from the date the unconditional application was effective, to the date

of the Respondent's offer of reinstatement, less his net earnings during said period. The amount of backpay due shall be computed according to the Board's policy set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest on backpay computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. Payroll and other records in possession of the Respondent are to be made available to the Board, or its agents, to assist in such computation and in determining the right to reinstatement.

It will also be recommended that the Respondent bargain collectively with the Union and, in view of the nature of the unfair labor practices which I have found to have been committed, I shall further recommend that the Respondent cease and desist from in any manner interfering with its employees' rights guaranteed under Section 7 of the Act.

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in this proceeding, it is recommended that the National Labor Relations Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, order that the Respondent, Linden Lumber Division, Summer & Co., Columbus, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discriminatorily failing or refusing upon their unconditional request to reinstate any of its employees who have engaged in a strike and are lawfully entitled to reinstatement, or by discriminating against its employees in any other manner in regard to hire or tenure of employment or any term or condition of employment.

(b) Refusing to bargain with the above-named Union as the exclusive representative of its employees in the unit found to be appropriate for the purposes of collective bargaining.

(c) In any other manner interfering with, restraining, or coercing its employees in the evercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Notify the said employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Upon request, bargain collectively in good faith with the above-named Union as the exclusive representative of the employees in the unit heretofore found appropriate, concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Preserve and, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due and to analyze reinstatement rights under the terms of this Recommended Order.

(e) Post at its premises in Columbus, Ohio, copies of the attached notice marked "Appendix."[15] Copies of said notice, to be furnished by the Regional Director for Region 9, after being duly signed by a representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 9, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.[16]

15. In the event that this Recommended Order is adopted by the Board the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

16. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 9, in writing within 10 days of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

Notice To All Employees

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in or activity on behalf of Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily failing or refusing to reinstate any of our employees or by discriminating in any of other manner in regard to hire or tenure of employment or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their former positions, without prejudice to seniority and other rights and privileges.

WE WILL make the said Marsh and Alexander whole for any loss of pay suffered as a result of refusing to reinstate them.

WE WILL, upon request, bargain collectively in good faith with the above-named Union, as the exclusive bargaining representative of our employees in the unit found by the National Labor Relations Board to be appropriate for the purposes of collective bargaining, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

All truck drivers, warehousemen, production and maintenance employees and yard men at the Re-

spondent's facility at 1850 Dunune Avenue, Columbus, Ohio, excluding office clerical employees, guards, and supervisors as defined in the Act.

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named Union or any other labor organization.

LINDEN LUMBER DIVISION, SUMMER & CO.
(Employer)

Dated By
(Representative) (Title)

Note: We will notify the employees to be reinstated, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407, Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513—684-3663.

APPENDIX H

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

IVAR H. PETERSON, Trial Examiner: On January 26, 1968, I issued my Decision in this proceeding, finding that the Respondent had engaged in unfair labor practices violative of Section 8(a)(1), (3), and (5) of the Act. On April 15, the Board issued an Order, following receipt of exceptions and briefs, remanding the proceeding to me "for the purpose of making findings of fact concerning (1) the supervisory status of Henry Shafer, and (2) if a supervisor, the impact of Shafer's conduct on the validity of the Union's majority, and for making any other or additional findings and recommendations based on the record, supplemented, if necessary, by evidence received at a reopened hearing."

Having further considered the matter, I conclude that it is not necessary to take additional evidence at a reopened hearing inasmuch as the record as presently constituted is adequate to permit the making of findings regarding the supervisory status of Shafer and the impact of his conduct on the validity of the Union's majority.

In my original decision I stated that it was unnecessary to determine whether Shafer was a supervisor and, further, that the evidence on this issue was inconclusive. Upon a further review of the record, I am now of the opinion that the evidence sufficiently establishes that he was a supervisor, and I so find. Aside from the conclusionary testimony of General Manager Riley and Assistant Manager Dunfee to the effect that Shafer was the mill foreman or mill superintendent and "supervised" two men, Ross and Beckelheimer, there is credible testimony of Robert Dupre, the dispatcher, and William Mason, a truck-driver who on occasion worked in the mill, that Shafer was the mill superintendent and a supervisor. Moreover, Smedstad, the Union's attorney, testified that on February 3, 1967, prior to

the meeting concerned with the Union's representation petition, he discussed with Shafer the latter's duties and, after he (Smedstad) had submitted to the hearing officer a written request to withdraw the petition advised Shafer "that I thought the chances were good that the Labor Board would conclude that he was a "supervisor." Smedstad further testified that he based his view in part upon the fact that Shafer, unlike Marsh, "had gotten a written set of instructions outlining what his supervisory authority was." Considering all the testimony regarding Shafer's status, I am persuaded that it sufficiently establishes that he had and exercised supervisory authority, and I so find.

As to the second issue on which the Board has ordered that I make findings in the event I determine Shafer was a supervisor —"the impact of Shafer's conduct on the validity of the Union's majority"—the conclusion I reach is that the Union's majority is in no way tainted or impaired by reason of Shafer's having signed an authorization card or by any other conduct on his part as disclosed by the record.

The initial contact with the Union was made on December 28, 1966, by William Martin, then an employee, who telephoned Dow Norman, business agent and organizer of the Union. The next day Norman met with 11 employees and Shafer at a restaurant. All of them including Shafer, signed authorization cards. Norman credibly testified and I find that Shafer did not at this meeting address the employees. The Union made its demand for recognition by letter dated January 3, 1967, and filed its petition on January 5. There is no evidence that Shafer solicited any employees to sign authorization cards or to support the Union. Dispatcher Dupre did testify that Shafer, during the organizational period, "told me he hated Bill Dunfee, and he was going to get Dunfee, and that they were going to get the union in or he was going to quit." Yard Foreman Toops testified that Shafer talked about the Union and in that connection said, "they were out to get Bill Dunfee." Mason, a truckdriver, who did not attend the organizational meeting on December 29, and did not sign an authorization card, testified Shafer stated to

him, "We are trying to get a union in here," but said nothing about Dunfee.

As heretofore found, Organizer Norman met with employees on February 4, the day after the aborted representation hearing at which Mr. Rector, on behalf of the Respondent, refused to recognize the Union or consent to an election, claiming that supervisors had coerced employees into signing authorization cards. Nine employees, as well as Shafer and Marsh, the two card signers whose status was in dispute, were present. Norman at that meeting stated that since their status was in question Shafer and Marsh "would not be allowed to participate in this movement" and asked that they leave. The nine employees remaining were asked to read a document, which they then signed, affirming that they desired the Union to represent them, that each "has voluntarily signed" the document, and that each "believes the company would *not* want us to join" the Union. This document, together with the Union's request for recognition and a proposed recognition agreement, were given by Business Agent Norman to General Manager Riley on February 6. For the Respondent, Rector replied on February 8, refusing to recognize the Union, asserting that the Union's membership "includes supervisors . . . who influenced and dominated employees of the proposed unit," a position made clear by the company at the NLRB hearing February 3, 1967," and further stating that "the company can not recognize your union so long as the supervisory influence exists." After receipt of this letter Norman, on February 9 or 10, called a meeting of the nine employees who on February 4, had signed the statement affirming their voluntary adherence to the Union, at which they read Respondent's February 8 letter and Norman explained that it meant that Respondent was refusing to accept the Union as the employees' bargaining agent. A strike vote was taken, by secret ballot, with the result that the nine employees voted unanimously to strike. All of them, except Robert Beckelheimer, joined in the strike which began on February 15 and picketed the Respondent's premises.[1]

To summarize, I find that Shafer, a supervisor, attended the initial organizational meeting of employees on December 29, 1966, and signed an authorization card. There is no evidence, however, that he solicited employees or otherwise enlisted their support of the Union. He did tell one employee, Mason, that an effort was being made, which he supported, "to get a union in here"; Mason did not sign a card or support the Union. At the February 4 meeting Shafer, as well as Marsh, was told by Business Agent Norman that, in view of the Respondent's contention that he was a supervisor, he could no longer participate in union activities, and he and Marsh were asked to leave the meeting. Thereafter, the remaining nine employees signed a statement affirming that they voluntarily desired the Union to act as their collective-bargaining representative, and later voted by secret ballot to strike and all but one did engage in the strike. Assuming that an inference of supervisory influence in the procurement of authorization cards at the initial meeting on December 29, 1966, might be drawn from the presence of Shafer at that meeting, I am of the opinion that such an inference is negated by the subsequent action of the rank-and-file employees, after Shafer had been told in their presence that he could no longer participate, in affirming their designation of the Union on February 4, and, after Shafer quit his employment, unanimously voting to strike. Accordingly, I find that the Union's majority status is not impaired or tainted by any conduct of Shafer.

Except with respect to my original findings that it was unnecessary to determine Shafer's supervisory status and that in any case the evidence relating thereto was inconclusive, which necessarily are modified as set forth in this Supplemental Decision, I adhere to the findings, conclusions and recommendations contained in my original decision herein, issued January 26, 1968.

1. Beckelheimer quit on February 19. According to the Respondent, Beckelheimer took Shafer's position when Shafer quite on February 6. According to Yard Foreman Toops, Shafer told him the morning of February 4 that the Union "sold us down the river," turned in his keys to Dunfee, and stated that he quit.

APPENDIX I

RELEVANT PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, 29 U. S. C. § 151, *et seq.*

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives or his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 9. (a) Representative designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

• • • • •

Supreme Court, U. S.
FILED
JUL 11 1974
[illegible], JR., CLERK

APPENDIX

VOLUME I

(LINDEN LUMBER DIVISION, SU[illegible])

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & Co.,
Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 73-1234

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

TRUCK DRIVERS UNION LOCAL No. 413, AND
TEXTILE WORKERS UNION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONS FOR CERTIORARI FILED FEBRUARY 11, 1974
CERTIORARI GRANTED APRIL 22, 1974

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 73-1234

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

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TRUCK DRIVERS UNION LOCAL NO. 413, AND
TEXTILE WORKERS UNION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the matter of: Truck Drivers Union Local No. 413, et al.

Case Nos. 9-CA-4197
Case Nos. 9-CA-4283
Case Nos. 9-CA-4309

2.23.67	Charge filed in 9-CA-4197
5.24.67	Complaint and notice of hearing issued in 9-CA-4197
5.25.67	Charge filed in 9-CA-4283
6. 8.67	Charge filed in 9-CA-4309
undated	Linden Lumber Division, Summer & Co. (hereinafter called Linden Lumber Division), answer to complaint
7.31.67	Complaint and notice of hearing issued in 9-CA-4283
undated	Linden Lumber Division, answer to complaint
7.31.67	Complaint and notice of hearing issued in 9-CA-4309
undated	Linden Lumber Div., answer to complaint
7.31.67	Regional Director's order consolidating cases and rescheduling hearing, dated
10. 3.67	Hearing opened
10. 4.67	Hearing closed
1.26.68	Trial Examiner's Decision issued
2.19.68	Linden Lumber Div., exceptions to the Trial Examiner's Decision, received
4.15.68	Board's order remanding proceeding to Trial Examiner for further recommendations, dated
4.26.68	Trial Examiner's Supplemental Decision issued

5.17.68 Linden Lumber Div., exceptions to the Trial Examiner's Supplemental Decision, received

6. 7.71 Decision and Order issued by the National Labor Relations Board.

9.13.73 Decision and Judgment of Court of Appeals for District of Columbia Circuit

10.11.73 Linden Lumber Company's petition for rehearing received.

11. 6.73 Court's order filed denying petition for rehearing

4.22.74 Order of the Supreme Court granting certiorari

[1]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 9-CA-4283
Case No. 9-CA-4309
Case No. 9-CA-4197

LINDEN LUMBER DIVISION, SUMMER & CO.

and

TRUCK DRIVERS UNION LOCAL NO. 413, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Court Room, College of Law Building
Ohio State University
1659 North High Street
Columbus, Ohio
Tuesday, October 3, 1967

Met, pursuant to notice, at 10:00 a.m.

BEFORE:

IVAR H. PETERSON, Trial Examiner.

APPEARANCES:

HARVEY B. RECTOR, 2772 Manchester N. W., North Lawrence, Ohio 44666, appearing on behalf of the Respondent.

EDWARD C. VERST, Room 2407, Federal Office Building, 550 Main Street, Cincinnati, Ohio, General Counsel, appearing on behalf of the Charging Party.

VICTOR I. SMEDSTAD, 307 - 11 West Monument Building, Dayton, Ohio 45402, appearing on behalf of the Charging Party.

• • • •

[6] MR. VERST: I would like to propose the following stipulation, namely, that the following individuals

with the following job classifications fall within the appropriate collective bargaining unit as alleged in Paragraph 6 of the Complaint in Case No. 9-CA-4197, and as admitted to be an appropriate bargaining unit in answer to that complaint; that they were employees within the collective bargaining unit at all times material herein, namely, Richard Alexander, truck driver; Robert Beckelheimer, mill worker; Melvin Bice, yard worker. General Counsel will reserve his position on Robert Dupre, classification, dispatcher.

The next individual within the appropriate unit would be Roy Hamilton, truck driver; Buddy Kountz, K-o-u-n-t-z, truck driver; Norman LeVeck, truss plant worker; William Lynch, L-y-n-c-h, truck driver.

General Counsel contends that Richard Marsh is non supervisory.

[7] TRIAL EXAMINER: But you also will agree that Respondent contends that he is?

MR. VERST: I will also agree with that.

TRIAL EXAMINER: That is an issue to be determined?

MR. VERST: Yes, sir.

The next individual within the appropriate unit is Bill Martin, a yard worker; Floyd Ross, Mill worker; John Thompson, yard worker, and we will stipulate with Respondent Employer that at all times material herein Roy Toops, T-o-o-p-s, was a supervisor as defined in Section 211 of the Act.

MR. RECTOR: How about Schafer?

MR. VERST: General Counsel at this time will reserve his position on Henry Schafer.

MR. SMEDSTAD: The Charging Party believes that the outcome of this case will not be affected in any way by whether or not Mr. Schafer is or is not a supervisor. Therefore, we would not enter into any stipulation as to his status. I feel certain that there will probably be litigation on it, but we would not take any position, either way, yet.

TRIAL EXAMINER: And your position, Mr. Rector, on Schafer is that he is supervisory?

MR. RECTOR: The Respondent's position here is that Roy Toops, whom they have conceded is a supervisor, is a [8] foreman, a yard foreman; Henry Schafer is a mill superintendent; Richard Marsh—They have it spelled March here, but it is Marsh—was superintendent of the truss department.

TRIAL EXAMINER: T-r-u-s-s.

MR. RECTOR: Yes.

And that Robert Beckelheimer became foreman in Schafer's place when Schafer resigned on February 6.

TRIAL EXAMINER: Other than the difference of view with respect to Schafer and Marsh, and the additional statement you just made about Mr. Beckelheimer replacing Mr. Schafer on or about February 6, there is agreement, is there not?

MR. RECTOR: Yes, I will go along with that statement and my statement, and will stipulate to that effect.

One other change here, too, Richard Alexander and Bill Martin were discharged, as I understand it. Alexander is a part of this case here.

TRIAL EXAMINER: Yes, I understand that.

MR. RECTOR: But Martin is not—But on January 9 he was. He was an employee and would have been.

TRIAL EXAMINER: He continued to be an employee until February 6?

MR. RECTOR: Yes.

TRIAL EXAMINER: All right. I think the result of [9] this colloquy is that there is agreement that the list as read by General Counsel encompasses all employees in an appropriate and at all times material, with the exception of the difference of view as to the status of Mr. Schafer, Mr. Marsh, and the added fact that subsequent to, or on or about February 6 Mr. Beckelheimer replaced Mr. Marsh?

MR. SMEDSTAD: Mr. Schafer.

TRIAL EXAMINER: Mr. Schafer?

MR. RECTOR: That is correct, sir.

TRIAL EXAMINER: All right. I would suggest that perhaps the list, which I see you have in front of you, be introduced as General Counsel's Exhibit 2, so that we are not solely dependent upon the transcript.

MR. VERST: Very well.

(General Counsel's Exhibit No. 2 was marked for purposes of identification.)

MR. VERST: We further stipulate that at all times material herein, William Dunfee was the assistant manager of the Respondent company and supervisor as defined in Section 211 of the Act.

MR. RECTOR: We can so stipulate.

MR. VERST: Thank you.

TRIAL EXAMINER: You do stipulate then?

MR. VERST: Yes.

TRIAL EXAMINER: Do you wish to offer General Counsel's [10] Exhibit 2 into evidence?

MR. VERST: Yes.

TRIAL EXAMINER: Any objection, Mr. Rector, as to General Counsel's Exhibit 2, the list?

MR. RECTOR: No.

TRIAL EXAMINER: Very well. It will be received.

(The document marked General Counsel's Exhibit No. 2 was received into evidence.)

MR. VERST: May we further stipulate, Mr. Rector, that while we both reserve our position on Henry Schafer, the company contending he is a supervisor and General Counsel contending he is not supervisory, may we further stipulate that he voluntarily quit on February 5, 1967?

MR. RECTOR: Yes—just a moment. February 6.

MR. VERST: February 6, all right, I will agree to that. The Charging Party will so stipulate.

MR. RECTOR: I will stipulate.

TRIAL EXAMINER: All right.

MR. VERST: May we further stipulate at this time Mr. Rector, that employee William Lynch quit on or about February 21 or 22, 1967?

MR. RECTOR: Approximately that date. Yes, we will stipulate.

MR. VERST: General Counsel so stipulates.

TRIAL EXAMINER: Very well, it will be received.

[11] MR. VERST: May we further stipulate that Robert Beckelheimer, whom I believe the Employer contends took over Henry Schafer's place when Mr. Schafer voluntarily quit, that Robert Beckelheimer quit on or about February 19, 1967?

MR. RECTOR: We will so stipulate.

MR. SMEDSTAD: So stipulate.

• • • •

[12] DOW NORMAN

a witness called by and on behalf of the Charging Party, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated, and state your name and address for the record.

THE WITNESS: Dow Norman, 2249 Springmont Street, Columbus, Ohio, County of Franklin.

DIRECT EXAMINATION

BY MR. VERST:

Q Mr. Norman, by whom are you employed?

A The Teamsters Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 413, Columbus, Ohio.

Q Was this formerly known as the Truck Drivers Union Local 413, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America?

A That is right.

Q It was formerly known as the name which I just stated until recently, when a new charter was obtained to [13] read the Teamsters?

A That is right.

Q Local No. 413?

A That is right.

Q What is your position with that organization?

A Business agent and organizer.

Q How long have you held that position?
A Four years.

• • • •

[16] BY MR. VERST:

Q Mr. Norman, are you aware of the fact that there was an [17] organizing campaign among the employees of the Linden Lumber?
A That is correct.
Q Were you involved in this organizing campaign in any manner?
A That is right.
Q How did you first become involved in this campaign?
A A telephone call.
Q When?
A On or about December the 28th.
Q Was this from an individual who identified himself as an employee of Linden Lumber?
A That is right.
Q Now, as a result of this telephone call, did you then schedule a meeting with the employees?
A I did.
Q When and where?
A December 29—should I name the place?
Q Yes, where?
A Zona's Restaurant.
Q Zona's Restaurant?
TRIAL EXAMINER: How do you spell that?
THE WITNESS: Z-o-n-a-'s.

BY MR. VERST:

Q Now, did this meeting, in effect, take place?
[18] A Pardon?
Q Did this scheduled meeting, in fact, take place?
A Yes, it did.
Q Approximately how many employees of the Linden Lumber attended this meeting?
A Twelve.

Q I hand you what has been marked for identification General Counsel's—and received into evidence subject to reservation—Exhibits 4-A through 4-L and ask you if you can identify those cards for me, pleae?
Let's take 4-A.
A Yes. I can identify it.
Q What is 4-A?
A It is an authorization card.
Q Signed by whom?
A Melvin Bice.
Q Who did Mr. Bice receive this card from?
A From me.
Q Mr. Bice signed that card in your presence?
A Yes, he did.
Q After he signed that card in your presence, what did he do with it?
A He gave it to me.
Q Okay. How about 4-B?
A Richard Alexander signed this card before me on [19] December 29 and handed it back to me.
Q Who did he get it from?
A Now, wait a minute. They didn't hand them back individually or sign them individually, they signed them all at the same time, simultaneously.
Q Did you personally hand these cards to all the employees?
A That is right.
Q Did Mr. Alexander sign that card in your presence?
A Yes, he did.
Q Was this card then handed back to you?
A After everybody had signed them I collected the cards.
Q Okay. How was this done? Was this on a big table?
A Yes, it was. There were two tables drawn together and a booth.
Q Were you at the head of the table?
A Yes, I was—Well, I was on the side of the table, watching them, standing—
Q Okay.

A —because I was telling them—They would ask me questions as to how to sign the card, and I was telling the they couldn't be printed and they had to be signed.
Q Okay. How about 4-C?
A Frederick Baum, truck driver, signed this card before me on the 29th of December of '66. This gentleman has since [20] been discharged.
Q Did you hand the card to Mr. Baum?
A I did.
Q Did he sign it in your presence?
A He did.
Q Was the card returned to you?
A That's right.
Q Okay. 4-D?
A Homer Beckelheimer signed this card in front of me on 12-29-66. He was one of the gentlemen sitting in the booth.
Q Did you hand him the card?
A I did.
Q Did he sign it in your presence?
A He did.
Q Did he then return the card to you?
A He did.
Q 4-F?
TRIAL EXAMINER: What about 4-E?

BY MR. VERST:

Q Okay. How about 4-E?
A Roy Hamilton signed this card in my presence, 12-29-66.
Q Did you hand Mr. Hamilton that card?
A Yes, I did.
Q When he finished signing it in your presence, did he return it to you?
[21] A Yes, he did.
Q 4-F?
A Fred Kountz signed this card in my presence, 12-29-66.
Q Did you hand the card to Mr. Kountz?
A Yes, I did.
Q After he signed it did he return it to you?

A Yes, he did. Not immediately.
Q Prior to the expiration of said meeting?
A Yes.
Q How long did this meeting last?
A I would say about an hour.
Q Okay. 4-G?
A Norman LeVeck signed this card in my presence on 12-29-66.
Q Did you hand the card to Mr. LeVeck?
A Yes, I did.
Q After he signed it, did he return it to you?
A Yes, he did.
Q 4-H?
A Richard Elmer Marsh signed this card in my presence, 12-29-66.
Q Did you hand that card to Mr. Marsh?
A Yes, I did.
Q And after he signed it in your presence did he return it to you?
[22] A Yes, he did.
Q 4-J?
TRIAL EXAMINER: What about 4-I?
THE WITNESS: That is "I."

BY MR. VERST:

Q 4-I?
A Bill Martin signed this card in my presence, 12-29-66.
Q Did you hand that card to Mr. Martin?
A Yes, I did.
Q After he signed it, did he return it to you?
A Yes, he did.
Q 4-J?
A Floyd Ross signed this card in my presence, 12-29-66.
Q Did you hand the card to Mr. Ross?
A Yes, I did.
Q After he signed it, did he return it to you?
A Yes, he did.
Q 4-K?
A Henry Schafer signed this card in my presence, 12-29-66. He was the other gentleman in the booth.

Q Did you hand the card to Mr. Schafer?
A Yes, I did.
Q After he signed it, did he return it to you?
A Yes, he did.
Q 4-L?
[23] A John Thompson. He signed this card in my presence on 12-29-66. Since then, this man has retired.
Q Did you hand the card to Mr. Thompson?
A Yes, I did.
Q After he signed it in your presence, did he return it to you?
A Yes, he did.
MR. VERST: I don't know that this is procedurally necessary, but I will again offer these cards into evidence.
MR. RECTOR: No objection to them going into evidence.

BY MR. VERST:

Q I will ask you at this time, Mr. Norman, whether, during the course of this meeting with these employees and who you have testified signed these various authorization cards, at any time during this meeting did Mr. Marsh or Mr. Schafer get up and speak to the employees?
A No, they did not.
Q Did you do the talking?
A I did the talking.
Q Now, after you obtained these various authorization cards, did you then—or did the Local Union then send a letter to the employer?
A Yes, we did.
MR. VERST: I would like to have marked for identification General Counsel's Exhibit No. 5.

[24] (The document was marked for identification as General Counsel's Exhibit No. 5.)

BY MR. VERST:

Q I will show you what has been marked for identification General Counsel's Exhibit No. 5 and ask you

if that is the letter that was sent to Linden Lumber?
A That is right.
MR. VERST: I will offer General Counsel's Exhibit No. 5 into evidence.
TRIAL EXAMINER: Any objections?
MR. RECTOR: No objections.
TRIAL EXAMINER: It will be received.

(The document marked General Counsel's Exhibit No. 5 was received into evidence.)

BY MR. VERST:

Q Did your Local Union then file a petition with the National Labor Relations Board?
A Yes, we did.
MR. VERST: I would like this marked for identification, please.

(The document was marked for identification as General Counsel's Exhibit No. 6.)

BY MR. VERST:

Q I will hand you what has been marked for identification as General Counsel's Exhibit No. 6 and ask you if that is the [25] petition that your Local Union filed with the Board?
A Yes, it is.
MR. VERST: I will offer General Counsel's 6 into evidence.
MR. RECTOR: No objections.
MR. SMEDSTAD: No objections.
TRIAL EXAMINER: It will be received.

(The document marked General Counsel's Exhibit No. 6 was received into evidence.)

BY MR. VERST:

Q Now, did your Local Union receive a reply to your letter of January 3, 1967?
A Yes, we did.
MR. VERST: Please mark this for identification.

(The document was marked for identification as General Counsel's Exhibit No. 7.)

BY MR. VERST:

Q I will hand you what has been marked for identification as General Counsel's Exhibit No. 7 and ask you if that is the reply which you received from the Linden Lumber Company?

A Yes, it is.

MR. VERST: I will offer General Counsel's Exhibit No. 7 into evidence.

MR. SMEDSTAD: No objections.

MR. RECTOR: No objections.

[26] TRIAL EXAMINER: It will be received.

(The document marked General Counsel's Exhibit No. 7 was received into evidence.)

BY MR. VERST:

Q Now, was a hearing scheduled on the petition, General Counsel's Exhibit No. 6?

A It was.

Q Do you recall the date?

A February 3.

Q Do you recall the location?

A The New Post Office Building, Marconi Boulevard, Second Floor, Room 209.

Q Did you attend this hearing?

A Yes, I did.

Q Who else attended on behalf of the Union?

A Victor Smedstad, representing attorney; two employees, Dick Marsh and Henry Schafer, employees of the company.

Q Who was present for the Employer?

A There was Mr. Riley; Mr. Harvey Rector, representing the company; I think there was a Mr. Pohlman there.

Q Mr. Pohlman?

A I think.

Q Do you know what relation he has with the company?

A I think he works in the office.

Q All right.

[26A] A I said Mr. Dupre, didn't I? There was Mr. Toops.

Q Was that Robert Dupre?

A Yes.

Q Okay. Was that Roy Toops?

A Roy Toops.

Q Okay.

A Lynch, Mason, and there were either two or three representing—representatives of another company, Summers and Company.

Q Okay. Would you tell the Court what happened at this hearing?

A Well, there wasn't a hearing.

Q You mean it did not go on in a formal record?

A That's right.

Q What, in fact, happened?

A Well, while in the hearing room, Mr. Rector and our attorney and the Hearing Officer—I cannot recall his name, I think it was Brown—they were talking back and forth about the unit. Mr. Rector was saying that his company could not recognize the Teamsters Union as the bargaining agent because his company was primarily made up of supervisors—or words to that extent, that I could understand.

Then there was quite a bit of confusion and arguing back and forth amongst the parties concerned, and the conversation—The hearing just never got underway. The Hearing [27] Officer said that he was there to hear the case, not to decide what would be what, that that would be decided at Cincinnati, at the Regional Office.

Q What would be decided?

A Well, whether we would be the bargaining agent or not. Mr. Rector said that he didn't care whether it was —what was decided in Cincinnati at the Regional Office; that the company was taking the position that they still wouldn't recognize the Teamsters Union because they were primarily company supervisors. So our attorney tapped me on the shoulder and said we should call for a recess, which we did.

We asked the Hearing Examiner for a recess and went out into the hall.

Q Did you then, as a result of this conversation in the hall with Mr. Smedstad, withdraw the petition?

A Yes, we did. He recommended that, and called my boss—our boss, and our boss told us to go ahead, told the attorney to go ahead as he saw fit.

Q Now, when you left the hearing at the Post Office Building, where did you go from there?

A The two employees of Linden Lumber, we advised them to go back to work.

Q Who were they?

A Henry Schafer and Dick Marsh.

Q Where did you and Mr. Smedstad then go?

[28] A Vic and I went back up to our office at 233 South High.

Q The Union offices?

A The Union offices, yes.

Q And while there, what did Mr. Smedstad do?

A He gave it some deep thought—I guess that's what you call it—and proceeded to draw up some documents. He went through a few books there and drew up some documents.

(Documents were marked General Counsel's Exhibits Nos. 8, 9, and 10 for identification.)

BY MR. VERST:

Q I hand you what has been marked for identification as General Counsel's Exhibit No. 8, and ask you if that is one of the documents which Mr. Smedstad prepared while you were at the union offices on that day?

A That is right.

Q I will show you what has been marked for identification as General Counsel's Exhibit No. 9 and ask you if the typed portion of that document, consisting of approximately nine or ten lines, is also a document which Mr. Smedstad prepared at the union offices that day?

A That is right.

Q And now, I hand you what has been marked for identification as General Counsel's Exhibit No. 10 and ask you if that is also another document which Mr. Smedstad prepared at [29] that time?

A That is right.

Q Did you then schedule another meeting with the employees?

A I did.

Q When was this meeting held?

A The next day, which would be Saturday, at noon.

Q February 4?

A February the 4th.

Q Where was this meeting held?

A At the Union Hall, 233 South High Street.

Q Okay. How many employees of Linden Lumber were in attendance at this meeting?

A There were 11.

Q Now, would you tell me what you told the employees at that meeting, and what action you took?

A I told the employees what transpired at the hearing.

Q What did you tell them?

A I told them that there was not a hearing and the company had taken the position that they were not going to recognize us, whether the Board ruled for us or not, and on the advice of our attorney we had drew up these papers.

Q When you say "these papers," now, you are referring to General Counsel's Exhibits 8, 9 and 10?

A That is right.

[30] Q Okay.

A And that we should approach the company in this manner.

Q What, if anything, did you do with those documents at that meeting?

A I distributed the documents to each and every member. I told them to read each and every document.

Q Did you distribute them to each and every employee present?

A That is right. No, wait a minute. To nine of them. I said there was 11 present.

TRIAL EXAMINER: There were nine present?

THE WITNESS: There was 11 present.

BY MR. VERST:

Q There were—Referring you to what has been marked for identification as General Counsel's Exhibit 9, in addition to the names appearing on that sheet, who else was present at the meeting?

A Dick Marsh and Henry Schafer.

Q Okay. Now, you testified that you showed General Counsel's Exhibits 8, 9, and 10 to all the employees present?

A That is right.

Q Except for Marsh and Schafer?

A That's right.

Q Did you ask these employees if they read these various documents?

[31] A After they read them—

Q Did you see them read the documents?

A Yes, I seen them read the documents.

Q Then what did you do?

A After I asked them if they had read the documents, all three of them, they said yes. So I said if they had read them, to come up to the desk—at the table, rather. Where the union hall is, there are seats out here, and there is a table up here (indicating), and I am sitting at the table. And when they approached and came up, I asked each and every one, before they signed it, "Are you sure you read all three of these documents and understand what it means?" And when they gave me a "Yes" answer, then they signed their names.

Q When they signed their names—you are referring to the various signatures appearing on General Counsel's Exhibit 9?

A Yes.

Q Did all those employees sign that in your presence?

A That is right.

Q Was this after you had asked them if they had read and understood all three documents?

A That is right.

Q Now, you state that Richard Marsh and Henry Schafer were present during this meeting?

A That's right.

[32] Q Did either of these two gentlemen speak to the employees during the course of this meeting?

A No, sir.

Q Now, after this meeting, following this meeting what, if anything, did you do with General Counsel's Exhibits 8, 9 and 10?

A Repeat that.

Q Following this meeting with the employees, after the meeting with the employees, what, if anything, did you do with General Counsel's Exhibits 8, 9 and 10?

A Well, this happened on Saturday.

Q What happened, the meeting?

A The meeting.

Q Okay.

A On Monday morning, at approximately—

Q Was this the following Monday?

A That's right, on the 15th, I think it was.

TRIAL EXAMINER: When you say the following Monday, that was the sixth.

THE WITNESS: Fifth or sixth, that's right, the sixth. The following Monday was the sixth.

BY MR. VERST:

Q It was the following Monday?

A Yes.

Q Okay.

[33] A The following Monday I arrived at the Linden Lumber, it was approximately ten o'clock—between 9:00 and 10:00—and I went in and asked for Mr. Riley.

Q The president?

A I guess he's the president. He was on the phone. So the man that went back and told him said he would be out in a moment, which he did.

When he came out, I showed him these documents, and I told him what they were, and I asked him if he wanted—if he would care to read them or if he cared

for me to read them to him, and he said no. He said, "Our attorney will take care of this." He said, "I'll send them to him."

So I said, "Well, would you care for some documents for yourself?" And he said, "No, our attorney will take care of these." He said he didn't have anything to do with it.

Q That was William Riley?

A That's right. I asked him who his attorney was and he said Mr. Harvey Rector. I thanked him and walked out.

Q Now, referring you to General Counsel's Exhibits 8, 9 and 10, which you testified you showed to Mr. Riley—

A Yes, I showed them to him.

Q —were these documents in a loose form, or were they enclosed in an envelope?

A They were in a loose form.

[34] Q Just as they appear there, there in your hands?

A That is right.

MR. VERST: I will offer General Counsel's Exhibits 8, 9 and 10 into evidence.

TRIAL EXAMINER: Any objections?

MR. RECTOR: No objections.

TRIAL EXAMINER: They will be received, then.

(The documents marked General Counsel's Exhibits 8, 9 and 10 were received into evidence.)

BY MR. VERST:

Q Was there any mention at the conclusion of this conversation with Mr. Riley as to whether or not he would be in touch with you or you would be in touch with him?

A Yes. He said that he would give it to his counsel and I asked him would we be hearing from him, and he said, "Yes, you will be hearing from us."

Q Did you, in fact, thereafter hear from him?

A Well, I called him a couple of days—

TRIAL EXAMINER: Called who?

THE WITNESS: Called Mr. Riley.

BY MR. VERST:

Q I am sorry. I didn't catch that. What was your answer?

A I said I called Mr. Riley in about two days.

Q All right, and what was that conversation about?

[35] A He said that he had sent the papers in and that if I hadn't received an answer, I should receive an answer shortly.

TRIAL EXAMINER: He sent the papers to Mr. Rector?

THE WITNESS: Right.

BY MR. VERST:

Q Did you thereafter receive a reply from Mr. Rector?

A Yes, I did.

MR. VERST: Please mark this for identification.

(The document was marked General Counsel's Exhibit 11 for identification.)

THE WITNESS: Yes, I did, the next day.

BY MR. VERST:

Q I show you what has been marked for identification General Counsel's Exhibit No. 11, and ask you if that is the reply which you received from Mr. Rector?

A That is it.

MR. VERST: I will offer General Counsel's Exhibit No. 11 into evidence.

MR. RECTOR: No objections.

MR. SMEDSTAD: No objections.

TRIAL EXAMINER: Very well. It will be received.

(The document marked General Counsel's Exhibit No. 11 was received into evidence.)

BY MR. VERST:

[36] Q Now, upon receipt by you of General Counsel's Exhibit No. 11, did you thereafter conduct another meeting with the employees of Linden Lumber?

A Yes, I did.

Q And where was this meeting conducted?

A At the Union Hall.
Q At 233 South High?
A 233 South High.
Q And who was in attendance at this meeting, so far as the employees of Linden Lumber?
A There were nine employees involved.
TRIAL EXAMINER: What date was this?
THE WITNESS: This would have been the 9th or the 10th.
TRIAL EXAMINER: The 9th or 10th of February?
THE WITNESS: That's right. I know when I got the letter I immediately called the meeting.

BY MR. VERST:

Q Okay. Showing you General Counsel's Exhibit No. 9, received into evidence, I will ask you if all the employees whose signatures appear on that document were in attendance at that meeting held either February 9th or 10th?
A Yes.
Q Now, will you tell us what happened at that meeting?
A I showed the employees the letter that I had received from Mr. Rector.
[37] Q Are you referring now to General Counsel's Exhibit No. 11?
A That is right. I first read it to them—
Q You did what?
A I first read the letter to them.
Q Okay. Continue.
A Then I passed the letter around among them and told them to read it, too. They also read it, and then I explained to them what it meant.
Q Okay. What did you tell the employees?
A I told them the company was refusing to accept us as their bargaining agent.
Q Okay. What else did you tell them?
A I told them—I said we only had one more way to go, through a strike.
Q Was there, in fact, a strike vote taken?

A That is right.
Q How did you go about this?
A There was a motion put on the floor whether the people wanted to strike Linden Lumber or whether they didn't. There was a motion put on the floor and seconded.
Q Was this motion put on the floor and seconded by employees present?
A That's right.
Q Okay. You may continue.
[38] A After it was put on the floor and seconded, I explained to them how they went about it. I told them—
Q How they went about what?
A To take a strike vote. I said it was by secret ballot and that everybody had a right to vote the way they pleased, and under no circumstances did I want anybody letting anybody else see how they marked a ballot, and I said, "If you want to strike the Linden Lumber Company you will mark 'yes' on a piece of paper"—which I gave them. I said, "If you don't want to strike, you mark 'no.'" And I said that is the reason, "If you don't want anybody to see, if you are afraid you are going to be made fun of," and I said "then they don't see. They can't make fun of you."
I said, "Fold the ballot so nobody can see it and drop it in the hat."
They folded the ballots, they dropped them in a hat, they were collected by a member and it was put on the table, dumped out on the table, and one member unfolded them and the other member called out yes or no. I took the tally.
Q And what was the result of the tally?
A There were nine yeses and no noes.
Q Nine yes—what?
A Nine yes to strike.
Q Did the employees subsequently strike Linden Lumber Company?
[39] A Yes, they did.
Q When did the strike commence?
A The 15th of February. The morning of the 15th.

Q I will show you what has been received into evidence as General Counsel's Exhibit 9 and I will ask you if all the employees whose signatures appear on that document went out on strike and walked a picket line at Linden Lumber?

A That's right, all but Robert Beckelheimer.

Q All the employees on that list except Robert Beckelmyer?

A Robert Beckelheimer.

Q Did Mr. Beckelheimer remain on the job?

A Yes, he did.

Q Do you know approximately how long?

A I think it was a day and a half.

Q Do you know of your own knowledge of Mr. Beckelheimer quit?

A Yes, he did. He gained employment at another place.

Q Is it your testimony that all these employees whose names appear on General Counsel's Exhibit 9, with the exception of Beckelheimer actually walked the picket line?

A That is right.

MR. VERST: Have I as yet offered General Counsel's Exhibit No. 11?

TRIAL EXAMINER: Yes, you have, and it has been [40] received.

MR. RECTOR: Objection.

TRIAL EXAMINER: It is received.

BY MR. VERST:

Q One thing: At this meeting at which this strike vote was taken and which you have testified occurred either February 9th or 10th, did Mr. Henry Schafer or Mr. Richard Marsh show up at that meeting?

A No, they did not.

Q Did Mr. Richard Marsh come out on the picket line on February 15, 1967?

A No, he did not.

Q Do you know why he did not?

A Well, his status was still undecided by the union or the company. It was under question, as far as we were concerned, with the NLRB, whether he was to be classed a supervisor. It was under question whether or not he was a supervisor or whether he was a rank and file.

Q And did you advise Mr. Marsh that in view of this he should stay in and work?

A That is right.

Q Do you recall for approximately how long Mr. Marsh remained in the plant?

A No, I do not.

Q Do you recall how long the strike lasted?

[41] A From February 15 to—up to the first of June.

• • • •

[42] BY MR. SMEDSTAD:

Q Mr. Norman, you testified earlier concerning the first meeting with these employees, on or about December 29, is that correct?

A That is correct.

Q What year was that?

A 1966.

Q '66. Where did that meeting take place?

A Zona's Restaurant.

Q Where is Zona's Restaurant located?

A Cleveland Avenue.

Q What city?

A Columbus, Ohio.

Q I want you to look at what has been received as General Counsel's Exhibit 4-D, a card signed by Mr. Beckelheimer, and the card's signature is Homer R. Beckelheimer. Is he also known as Robert Beckelheimer?

A That is right.

Q Now, I want to draw your attention to the meeting that you held with the employees at the Union Hall on February 4, the day after the hearing.

A Yes.

[43] Q At the beginning of that, when the employees showed up, did you see either Mr. Marsh or Mr. Schafer?

A That's right.
Q Did you see both of them?
A That's right.
Q Did you say anything to them?
A Yes, I did.
Q What did you say to them?
A I told them that our attorney had decided that their cases were subject to the ruling of the Labor Board, and that they would not be allowed to participate in this movement.
Q Let me move back another day, to February 3, at the New Post Office, and the scheduled Labor Board hearing that you testified about. I believe you testified that there was a man by the name of Lynch and a man by the name of Mason present. Is that correct?
A That's right.
Q Were these two gentlemen employees of the Linden Lumber Company?
A That's correct.
Q Do you know what jobs they held at Linden Lumber?
A I did not. I knew Lynch was a truck driver. I didn't know whether Mason was or not, but I knew he was immediately thereafter.
Q Were they present in the room at the time Mr. Rector [44] was talking in the manner to which you testified?
A Yes, they were.
MR. RECTOR: I don't quite get that. Do you know—Do you mean in the hearing room of the NLRB hearing on February 3?
MR. SMEDSTAD: Yes.
I have no further questions.
TRIAL EXAMINER: All right. Mr. Rector, go ahead.

CROSS-EXAMINATION

BY MR. RECTOR:

Q Mr. Norman, I believe you testified that your first contact with the Linden Lumber Company was by an employee calling you on the phone?
A That's right.
Q Who was that employee?
A Do I have to answer that?
TRIAL EXAMINER: Yes.
THE WITNESS: Of course, he is no longer in your employ anyway. Dick Martin—Bill Martin.

BY MR. RECTOR:

Q Bill Martin?
A Yes.
Q Now, in your organizational campaign out there, when you got it going, who was your union representative then at [45] Linden Lumber Company?
A All of them.
Q All of them were. You mean you didn't have any steward or anything?
A No. You don't have stewards until after you have a contract with the company.
Q Well, don't you have a committee, or some spokesman or something?
A They were all acting as committeemen.
Q Who.
A They were all acting as committeemen, and speaking for themselves.

• • • •

[54] Q You do, though, contend that I said there wasn't going to be any election; we weren't going to recognize this union regardless of who said what?
A That is right.

• • • •

[57] Q You have testified here that you were going to let the Board decide the status of Schafer and Marsh, haven't you?

A Should I answer that?
MR. VERST: Yes.
[58] THE WITNESS: Well, I will tell you, we knew that—what you were trying to do.

BY MR. RECTOR:

Q Oh, you did?
A After a bunch of litigation and about two years, and all your people's gone, that we would still have to strike if we wanted—so we figured we might as well do it now and get it over with, and I have never been in a hearing in my life that was staged such as that. Never.

• • • •

[59] Q Now, this General Counsel's Exhibit 9, this list of people that you presented, that was for the purpose of showing a majority, wasn't it?
A Naturally.
Q Now, if you had a majority, why did you withdraw your petition for an election? Why didn't you go ahead and have your election?
[60] A I think I have already stated that.

• • • •

RICHARD MARSH

a witness called by and on behalf of the Charging Party, being first duly sworn, was examined and testified as follows:

[64] Q Will you tell us what happened at this meeting, sir?
A Yes. We went in and sat down, and while we were sitting there Mr. Rector was talking to the Hearing Officer about wanting to get his men down on record, and the Hearing Officer was telling him at that time that he wasn't interested in this, he was more or less interested in finding out what individuals could vote and who couldn't, and Mr. Rector said that he was here to prove the company was supervisory, and again the man said that he would take the evidence but he

was here to get the evidence for the Board, and the NLRB would make the final decision to find out which individuals would vote. And at that time Mr. Rector said that it made no difference to him what the NLRB said, that the company would not accept the union.

• • • •

[78] Q Mr. Marsh, were you ever told by anyone in management, let's say prior to February 1, 1967, that you had any authority to hire an employee?
A No, sir.
Q To fire?
A No, sir.
Q To transfer?
A No, sir.
Q To suspend?
[79] A No, sir.
Q To lay off?
A No, sir.
Q To recall?
A No, sir.
Q To promote?
A No, sir.
Q To reward an employee?
A No.
Q To discipline?
A No.
Q To adjust grievances?
A No.
Q To discipline?
A No.
Q Did you, in fact, ever exercise any of that authority?
A No, sir.
Q Prior to February 1 of 1967, was there any notice posted on any company bulletin board stating that you were any type of boss, foreman, or supervisor?
A No, sir.
Q Did you attend supervisory meetings?
A No, sir.
MR. VERST: I have no further questions

[80] BY MR. SMEDSTAD:

Q Mr. Marsh, were you employed at the company when Mr. LeVeck was hired?

A Was I? No, sir. You see, LeVeck was there for 17 years.

Q I see. When did he come into the area where you worked?

A He was the first one there. I guess he put—helped put the machinery and everything in.

Q When you first came in to the department, then, LeVeck was already working there?

A Yes, sir.

Q Did LeVeck say anything to you about whether or not he had been told by the company that you were his boss?

A No, sir. As a matter of fact, he told me the opposite.

Q What was it that he told you?

A He had made the statement that he asked Dunfee about it, if I was going to be boss back there, and Dunfee made the remark to him that he didn't think I was smart enough to be a boss.

• • • •

[98] RICHARD ALEXANDER

a witness called on behalf of the Charging Party, having been first duly sworn, was examined and testified as follows:

• • • •

Q Are you aware of the fact that there was a strike at Linden Lumber commencing on February 15, 1967?

A Yes.

[99] Did you come out of the plant and engage and participate in that strike?

A Yes, I did.

Q Did you carry a picket sign on the picket line?

A Yes, I did.

Q Did you thereafter return to the plant?

A Yes.

Q After the srike began?

A Approximately the end of May I went back with the rest of the men.

Q With whom?

A Bill Martin, Bice, LeVeck, Ross, Kountz, Thomas—I believe that's all.

Q Would you tell the Court what happened at this time?

A Well, we walked back in and asked for Mr. Riley, and he came out and Bill Martin asked him—or told him that we were ready to go back to work, and he asked us if the strike was over and we said we didn't know, but we were ready to go back to work.

Mr. Riley said to show him a sign that the strike was over, and then we would see about it.

Q So far as the employees that went out on strike, Mr. Alexander, did all of the employees whose names appear on General Counsel's Exhibit 9 go out on strike and walk the picket line and carry picket signs?

[100] A All except Beckelheimer.

CROSS-EXAMINATION

BY MR. RECTOR:

Q Mr. Alexander, you testified that you went out on strike February 15?

A That is correct.

Q That is correct?

[101] A Yes.

Q What did they tell you the strike was about?

A Well, this was—the company refused to recognize the Teamsters as a bargaining agent, and refused to recognize our union. It was a recognition strike.

Q In other words, they told you that it was definitely a recognition strike, is that correct?

A Yes, we struck for recognition.

Q Did they say anything about striking for a contract?

A No.

Q They didn't say anything about that?

A No.

Q Now, were you present at the meeting where these documents were read, this 8, 9, and 10?

MR. VERST: May the witness be shown the documents, please?

BY MR. RECTOR:

Q I will hand you General Counsel's Exhibit 10. Were you present when that was discussed?

A Yes, I was.

Q Now, in the discussion of this particular document, wasn't a contract brought up at all?

A No.

Q It wasn't brought up?

A No.

[102] Q I call your attention to paragraph 3—

A Yes, I see it there.

Q Wasn't the contract discussed, now, at that time?

A Well, not that I remember. This meeting was mostly to show the company that we had a majority of the men on the list.

Q I will hand you General Counsel's Exhibit 9. Is that the list you are talking about?

A Yes, sir.

Q I will hand you General Counsel's Exhibit 8, and was this document also discussed at that meeting?

A Yes.

Q Now, is it still your testimony that no contract was discussed at this particular meeting?

A The only way they were talking about a contract, about trying to have a contract with the company and the company refused to bargain with us at all. That's what I remember about the contract. It's been a long time ago now.

• • • •

[105] VICTOR I. SMEDSTAD

a witness called by and on behalf of the Charging Party, having first duly affirmed, was examined and testified as follows:

• • • •

[106] DIRECT EXAMINATION

BY MR. VERST:

Q Mr. Smedstad, are you a member of the bar?

A Yes, I am a member of the Ohio Bar.

Q And are you employed by a firm?

A Yes, I work with the law offices of Robert C. Knee.

Q And those law offices are located where?

A In Dayton, Ohio.

Q Now, in the course of your employment, does your law firm act as counsel for various Locals of the Teamsters Union?

A Yes, sir.

Q And did you, in the course of your practice, represent the Charging Party herein?

A Yes, sir.

Q At a representative hearing scheduled for February 3, 1967?

A That is correct.

Q Would you tell us in detail, sir, to the best of your knowledge and memory and recollection, just exactly what [107] transpired at this hearing?

A Well, first of all, the hearing never got under way in any formal way, but, if I may, I would like the privilege of backtracking a moment.

I was notified by the NLRB in Cincinnati that there was going to be a hearing on this petition because it appeared that the company was taking the position that two people were supervisors. I inquired as to who the individuals were and received the information that Henry Schafer and Richard Marsh were the ones. I, therefore, asked for and received and served subpoenas on these two individuals to appear at the hearing so that we might have testimony from these individuals to make sure the record was clear.

I met with these two individuals as witnesses approximately 45 minutes prior to the scheduled opening of the hearing.

Q Where did you meet with them?

A I met with them at the offices of Local 413 on High Street. I discussed with Mr. Schafer, for approximately a half hour, what his duties were and what his relationship with the company was.

I discussed very briefly with Mr. Marsh what his situation was, and by that time it was getting pretty close to ten o'clock. Marsh Schafer, Dow Norman and myself drove over to the New Post Office on Marconi Boulevard in Dow [108] Norman's automobile.

We walked up the second floor of the Post Office—as I recall the hearing was originally set for Room 205, and when we got there there was a note on the door saying that the hearing was moved to Room 209. With the other three individuals I walked down to Room 209. At the time—it was in February—I was wearing a blue car coat.

We came in to the hearing room. The hearing room, I should estimate, was about 14 feet across and perhaps 25 feet or better long, with perhaps five or six tables all pushed together in the center of the room, and there were chairs surrounding the tables. The four of us entered the room, and I don't think there were more than one or two chairs vacant on the door side. The rest of the chairs were pretty—well, fully occupied.

A gentleman who was afterwards identified to me as being the representative, I believe, of Summer was sitting immediately inside the door. As I faced this mass of tables, at the right-hand side, across the table, was a man whom I suspected was Harvey Rector, although I had not met him before. Immediately to his left and at the head of the table was Jack Baker, whom I knew to be an agent of the NLRB. To his left was a court reporter whose name I do not recall, but there was a young lady sitting beside her. Behind them was a series of chairs and a blackboard, as I recall.

[109] As I came into the room I believe the individuals on the door side stood up, because it became obvious there had to be some room for the four of us to sit down.

I took my briefcase and dropped it on to the table next to the court reporter, went behind the court reporter, took off my blue jacket and tossed it onto the set of chairs, and about this point Jack Baker introduced Mr. Rector to me as being a representative of the company.

Q Was Mr. Jack Baker assigned as the Hearing Officer for representation here?

A Yes.

Q Thank you.

A When I then moved over the chair where I had dropped my briefcase, Jack Baker handed me an appearance sheet.

I turned to Mr. Rector and I said, "I hope I don't have to fill this out. I've got a long name. Is there any possibility that we might enter into a consent?" And Mr. Rector said, "No, there is not."

He said, "If I might say it with a smile." I then sat down and was filling out the appearance sheet when Mr. Baker said, "Well, perhaps we can get some of the preliminary matters out of the way," and turned to Mr. Rector.

I looked up at that point. He turned to Mr. Rector and he said, "Mr. Rector, will you stipulate that the Petitioner is a labor organization within the meaning of [110] the Act?"

And Mr. Rector said, "No, I cannot stipulate to that. It is my understanding that this union,"—he did not say this unit, he said "this union"—"has been organized through the supervisors at Linden Lumber." He said, "It is my understanding of the law, from some cases that are now pending in the Sixth Circuit, that it would be unlawful for us to recognize any union that had been organized by supervisors."

Mr. Baker then said, "Mr. Rector, we are not talking about the unit. We are talking about this Local Union."

And Mr. Rector said, "That's right. I understand they have been organized by supervisors, and we cannot stipulate that they are a labor organization."

Mr. Baker said, "Well, you are familiar with the International Brotherhood of Teamsters?" And Mr. Rector said, "Oh, yes, they are a labor organization."

Then Mr. Baker said, "Well, we are just talking about Local 413, the Local Union of the International," at which point Mr. Rector said, "Well, all right. I will stipulate to that, but I want to go on record and make a record on the way in which this union was organized. I understand that it was organized by supervisors who coerced some of the employees into signing cards."

Mr. Baker said this evidence was not relevant in this [111] proceeding, and that he would not take such evidence, if the showing of interest was not a matter which could be litigated at a hearing, and Mr. Rector said, "You mean you are denying me the right to make a record, to have a record?" And Mr. Baker said, "Well, on this issue of how the union got its showing of interest, I will not hear this evidence."

Mr. Rector said, "Well, if you are going to deny me the right of the record on this, then the Board can do what it wants to. If it holds an election, the company will not bargain with the union."

At that point, I turned to Dow Norman, who was on my left, and told him that I thought we should discuss the matter, told Mr. Baker that if he didn't mind I wanted to talk to my client out in the hall, and then Dow and myself, Schafer and Marsh stepped out into the hallway.

In the hallway I discussed with my people the fact that due to the position that the representative of the company was taking, even though I felt that it was completely erroneous as far as the procedures of the Board were concerned, that if Mr. Rector just wanted to stand still and not do a darn thing—I suspect I used words stronger than darn—that he would drag this thing out for two years before any bargaining order would come about.

I asked the two individuals there, Schafer and Marsh, [112] whether or not the employees were really serious about a union, and I asked Dow the same question, and received the answer that they were.

I said, "It seems to me that this is a situation where, if you go through this hearing, regardless of how it turns out, it will be two years in all likelihood before

you can sit down and bargain with this company. There is a possibility that through economic action, in the way of a strike, the company might be willing to sit down and bargain, without having to go through any election."

The individuals, Dow, Schafer and Marsh, told me that it was their opinion that the employees were so highly irritated because of the manner in which the company was being run and the working conditions that all they would have to do would be to drop a nickel in the phone box and they would be out on the street right then and there.

At this point, I told them it was a matter of people sticking together, and if this was the way they felt I would ask the union president for authority to withdraw the petition and let them, and went down on the first floor of the Post Office where there was some public telephones and called the union number and talked to Dale Mann, whom I have known for about two years and with whom I have talked on many occasions on the phone, and recited to him what the problem was, and he understood, he said, that's what Harvey Rector's [113] reputation was, and that if I felt that the withdrawal of the petition was advisable, well, I would have full authority to do so.

I then returned up to the hearing area, I told Norm what Dale had said, and walked into the hearing room, and when I walked in I asked Jack Baker if he had a withdrawal request form, and Jack Baker looked through his papers and it appeared that he couldn't find one, and, I will be frank, I was a little nervous at the time, so I sat down with a pad of yellow paper and started to draw up a withdrawal form in longhand.

About that time, as I was sitting down, Mr. Rector —I will backtrack. As I came in the room, as I said before, Mr. Rector said, "By the way, I would like to talk to you when we are through with this," and I said, "Fine," and, as I say, I started to write out the withdrawal request, and Mr. Baker found a printed copy, filled out the appropriate formal parts of it and

handed it to me, and I signed it and returned it to him.

Mr. Baker asked Mr. Rector if he had any objection to the withdrawal or had any information which would be contrary to the position of the union, and Mr. Rector said he had no objection to the withdrawal. Mr. Baker then took it and said, "Thank you, gentlemen," and he started to leave the room, and several of the other people started to leave, [114] and Mr. Baker turned to me and said, "By the way, don't forget, Mr. Rector wanted to talk to you." So I passed a few words with someone else, I don't remember who it was, and Mr. Rector came around the table and he said, "Can I see you?" And I said, "Certainly."

We walked out into the hall, and to the best of my recollection there was no one else within hearing distance of us—at least, I don't recall seeing anybody else. Mr. Rector looked up to me and he said, "You know, I've known Bob Knee, Sr. for a good many years," and I said, "Yes, so I gather."

He said, "I originally came from Dayton," and I said, "That's what I've heard," and he said, "You know, I represent a lot of lumber companies up in Cleveland and the northern part of the state." I believe he mentioned another city. My recollection is that he said Canton—I may be a little wrong on that.

He said, "It's been our policy that whenever the union has a 30 per cent showing of interest that we are more than happy to enter into a consent agreement," and I said, "Well, Mr. Rector, I can assure you we had well over 30 per cent here." And he said, "Well, it is my understanding from my investigation that some supervisors have coerced some employees into signing cards," and I said, "Well, be that as it may," I said, "As I understand it, when this petition was [115] first filed the company submitted a list of 14 names to the Labor Board in Cincinnati and told the Labor Board that if the union would agree to these 14 members that the company would be willing to go through a consent election."

Mr. Rector said, "Yes, that's when they didn't know what they were doing, and when I came in on the case, when I looked at that list, I found that the list was not correct. For example, there was one individual who was no longer working at the plant," and he said, "Further, I understand that one or two people on here are supervisors."

I said, "Well, Mr. Rector, if this is what the problem is, I am certain if we would sit down maybe we could work out a list or we can agree on who the people are. If you and I can agree who the people are, will you enter a consent election?" And Mr. Rector said, "No, I will not."

He said, "According to the Sixth Circuit—"—and I believe he mentioned some case names, and I don't recall them now—I couldn't recall them when I was in law school—he said, "According to these decisions a company violates the law and commits an unfair labor practice if it bargains with a union that is dominated by supervisors." He said, "Now, if you were to come up with a new petition supported with a fresh showing of interest, a fresh 30 per cent showing of interest, then we would be happy to go into a consent election," and I said, "Well, Mr. Rector, we have virtually [116] all of the people lined up."

He said, "Well, I don't doubt that, but it was through the action of supervisors that they signed up, and, therefore, we will not sit down and bargain with you."

So I said, "Then there is no chance for a consent at this point," and he said, "No."

To the best of my recollection, at about that point we shook hands and he went his way and I went mine.

Q Upon leaving this hearing room, did you accompany Mr. Norman to the Union Hall?

A Yes, I did.

Q I show you what has been received into evidence as General Counsel's Exhibits 8, 9 and 10, and ask you if you recognize, if you are familiar with those documents?

A I certainly am.

Q Would you describe what you had to do in connection with these documents?

A I might say that I left the hearing area with Mr. Norman, Mr. Schafer and Mr. Marsh, and told Mr. Schafer that I thought the chances were good that the Labor Board would conclude that he was a supervisor and that he was basically on his own from here on out.

I told Marsh I thought his case was different; that we didn't want to have any problems, so—I don't remember whether I said I wanted to have him out of it, or words to [117] that effect.

Q You say you told Marsh his case was different?

A Yes, I said his case was different, and I said that even so, under the circumstances—

Q Different in what way?

A Well, I told him that while I thought Schafer was propably a supervisor that Marsh's status wasn't. I told him, in fact, for example, that Schafer had gotten a written set of instructions outlining what his supervisory authority was, and that Marsh had not received them and, in view of the circumstances under which this was distributed, as to the kind of duties that he had, that his situation was probably different. But, I said, I don't believe in tempting employers, so while, ordinarily at the close of a hearing, the union is out to lunch with the employees, I told Marsh that he had better not take any chances, I thought, and that he should go back to the plant and go back to work, and he would not eat lunch with us, but rather should return to the plant.

We, therefore, dropped Schafer and Marsh off—I don't remember the street—where one of their cars was parked, and I then went up to the office of the Local Union and sat down and looked at my copy of the rules and regulations, and took a yellow pad and drafted in longhand three instruments, which I then gave to Bill Gatton, the [118] office manager for 413 and asked to have copies typed up, which he did, and then brought them back to me, and what I have in my hand are accurate copies of what Bill gave me.

As a matter of fact, one—two of them are carbon copies which he did give to me, and the other one appears to be a Thermo-fax of a copy, a copy of one of the three documents.

I then gave these documents to Dow Norman and I said that under the circumstances I wanted to make sure that there was no way that the company or anyone else could take the position that the company was exercising undue influence on people who joined the union through the active participation of supervisors; that I felt that he should have a meeting with these employees and make sure that when they came they came there voluntarily and they came there without any influence from either Schafer or Marsh. I said I thought that they should attend a single meeting so there would be no question about what took place; that they should be read the documents which they were to sign, and they were to be told what it was, and if the union was going to attempt to get the company voluntarily to recognize the union, and that by signing it they understood it, the other documents I prepared, and I told Dow that I thought what he should do was to go over to the company, talk to someone in charge—not by telephone—read them the demand, which is General Counsel's [119] Exhibit 10, and also General Counsel's Exhibit 9 but, certainly, under all circumstances, to leave these two documents with the company, and if the company indicated that it was willing to go along with the propositions set forth in General Counsel's 10 that he should ask them to sign General Counsel's 8 after the blanks were filled in, if this was necessary.

I said, "Even if they don't agree, if you will, I think it would be beneficial if you gave a copy of General Counsel's 8 to the company so they would be fully aware of just precisely what it is that the union is seeking." Then I left.

MR. VERST: No further questions. Your witness.

CROSS-EXAMINATION

BY MR. RECTOR:

Q I have one question. Is it your testimony then that you actually withdrew the petition because you did not want to go through a long, lengthy litigation before the Board?

A Before the Board and before the Court of Appeals which would, from my experience, take a good two years or better.

Q I daresay, you are right; but that is the reason you withdrew your petition?

A That is correct.

• • • •

[122] WILLIAM RILEY

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

• • • •

DIRECT EXAMINATION

BY MR. RECTOR:

Q Mr. Riley, what is your position with the Linden Lumber Company?

A I am the manager of Linden Lumber Company.

Q General manager?

[123] A General manager.

Q Were you present at the NLRB hearing on February 3?

A Yes, sir.

Q Could you tell us your version of what happened?

A Yes, sir.

I don't have as good a memory as was related before, but, at the outset, Mr. Rector asked several times to go on the record. We did not really know if this was done or not—we thought it probably was, at the start,

and Mr. Rector stated that we could not deal with the union at this time because we would be violating a section of the law.

Q Did I say why we would be violating this section?

A Because it was dominated by supervisors from the company.

• • • •

[141] CROSS-EXAMINATION

BY MR. VERST:

• • • •

[157] Q Now, have you yourself ever given Mr. Marsh authority to fire? Have you, personally?

[158] A No.

Q Have you ever given him any authority to hire, you, personally?

A Not personally, no?

Q To discharge?

A For him to discharge?

Q Have you ever informed him that he had any authority to discharge?

A I never said, "Dick, you have."

Q This is what I am asking.

A No.

Q Suspend an employee? Have you ever informed him personally?

A The understanding was there.

Q Have you ever informed him personally?

A No.

• • • •

GC #4-A

AUTHORIZATION FOR REPRESENTATION

I, the undersigned, employed by

LINDEN LUMBER COMPANY

hereby request membership in TRUCK DRIVERS UNION LOCAL No. 413, and authorize said Union to represent me, and in my behalf to negotiate all agreements as to hours of labor, wages, Union Shop and other employment conditions.

/s/ MELVIN BUD BICE—Yard
Signature of Employee — Dept.

1129 Lenore Ave., Columbus, Ohio
Address — City

267-6738—Dec. 29, 1966
Telephone — Date

[UNION LABEL]

TRUCK DRIVERS UNION, LOCAL No. 413

OF THE INTERNATIONAL BROTHERHOOD OF

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

CA 1-6819 • CA 1-0776

233 SOUTH HIGH STREET COLUMBUS, OHIO 43215

[illegible] HANN
PRESIDENT
MIT DUNCAN
SECRETARY-TREASURER

January 3rd, 1967

NATIONAL LABOR RELATIONS BOARD
Case No. 9-CA-4117
Docket Entry No. 21 - GC Exhibit No. GC-5
Disposition: Identified ✓ Received ✓ Rejected
In the matter of Linden Lumber Co
Date 10-31-67 Witness Alexander Reporter Bauer
No. Pages 1

Linden Lumber Company
1850 Denune Avenue
Columbus, Ohio

Mr. William Riley, President;

This will inform you that a majority of all truck drivers, warehousemen, production workers, maintenance men and yard men employed by you have designated this local Union as their agent for collective bargaining for wages, hours and conditions of employment.

No other person or organization represents these employees and you are cautioned against taking any punitive action against these employees, or making any agreement with any other person or organization purporting to represent them.

We respectfully request that you recognize this local Union as the agent for collective bargaining for these employees.

We await your prompt reply.

Yours truly,

TRUCK DRIVERS UNION, NO. 413

Mit Duncan
Mit Duncan
Secretary-Treasurer

MD/wrg

RRR

45
GC #5

Form NLRB-502
(11-64)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved.
Budget Bureau No. 64-R002.14

PETITION

DO NOT WRITE IN THIS SPACE

CASE NO. 9-RC-7096

DATE FILED January 5, 1967

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition *(If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)*

(Check one)

- [XX] RC-CERTIFICATION OF REPRESENTATIVES—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] UC-UNIT CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees: *(Check one)* [ ] In unit not previously certified [ ] In unit previously certified in Case No. _____.
- [ ] AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____.

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER: Linden Lumber Company
EMPLOYER REPRESENTATIVE TO CONTACT: William Riley
PHONE NO.: 471-9000

3. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED *(Street and number, city, State, and ZIP Code)*: 1850 Denune Avenue Columbus, Ohio

4a. TYPE OF ESTABLISHMENT *(Factory, mine, wholesaler, etc.)*: Lumber Company

4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE: Lumber

5. Unit Involved *(In UC petition, describe PRESENT bargaining unit and attach description of proposed clarification.)*

Included: All truck drivers, warehousemen, production workers, maintenance men and yard men.

Excluded: Office, clerical, supervisory and professional employees, guard, watchmen and all others excluded by the Act as amended.

6a. NUMBER OF EMPLOYEES IN UNIT:
PRESENT 14
PROPOSED (BY UC/AC)

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?* [XX] YES [ ] NO
*Not applicable in RM, UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. [XX] Request for recognition as Bargaining Representative was made on 1/3/67 *(Month, day, year)* and Employer declined recognition on or about No Reply *(Month, day, year)* *(If no reply received, so state)*

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the NATIONAL LABOR RELATIONS BOARD.

8. Recognized or Certified Bargaining Agent *(If there is none, so state)*
NAME: None
ADDRESS:
AFFILIATION:
DATE OF RECOGNITION OR CERTIFICATION:

Docket Entries: Petition Received; Amended; Dispatched; Returned; OFFICIAL EXHIBIT NO. GC #6

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY *(Show month, day, and year)*

10. IF YOU HAVE CHECKED BOX UD IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP *(Month, day, and year)*

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES ____ NO XXX

11b. IF SO, [illegible] Linden Lumber Co

No. Pages 1

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF _____ *(Insert name)* A LABOR ORGANIZATION, OF _____ *(Insert address)* SINCE _____ *(Month, day, year)*

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c), WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (IF NONE, SO STATE.) None

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM *(Required only if Petition is filed by Employer)*

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Truck Drivers Union, Local #413, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

(Petitioner)

Mit Dewson
(Signature of representative or person filing petition)

Secretary-Treasurer
(Title, if any)

[illegible]eet, Columbus, Ohio 43215
(Address, city, State, and ZIP Code)

CApital 1-6619
(Telephone number)

WILLFUL FALSE STATEMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 894-283

GC #6

January 6, 1967

NATIONAL LABOR RELATIONS BOARD
GC-7

Mr. Mit Duncan
Truck Drivers Union
Local #413
233 South High Street
Columbus, Ohio 43215

Dear Mr. Duncan:

This will acknowledge receipt of your letter of January 3, 1967, in which you claim to represent certain of our employees and request the Company to recognize your Union as bargaining agent for such employees.

We do not believe that your Union does represent a majority of the employees specified in your letter and, accordingly, the Company declines to recognize you as bargaining agent unless and until you have been certified as such pursuant to an election conducted under the orderly processes of the National Labor Relations Board. We believe that this is the proper way to determine such questions.

Therefore, we suggest that you proceed in the manner prescribed by law. If you fail to file a petition in the near future, we may elect to do so.

Yours very truly,

Linden Lumber

William B. Riley
Manager

WBR/kc

GC #7 47

D. Norman B.A.

Linden Lumber Company hereby recognizes Truck Drivers Union, Local No. 413 as the collective bargaining representative of its employees in the following unit:

All Truck Drivers, Warehousemen, Production and Maintenance employees and Yard Men at its facility at 1850 Denune Avenue, Columbus, Ohio excluding office clerical employees, guards and supervisors as defined in the National Labor Relations Act.

By so recognizing the Union, the Company does not agree that the following men are in the unit:

_____

_____

The Union agrees that within 10 days after this recognition agreement is signed it will file an action with the N.L.R.B. asking it to clarify whether _____

_____ and _____

are employees in the above unit or are supervisors within the meaning of the Act. The parties agree that negotiations will not be delayed because of this problem but that any contract reached will be subject to the conclusion of the N.L.R.B. on the issue of whether or not _____

and _____ are in the appropriate bargaining unit.

NATIONAL LABOR RELATIONS BOARD
Docket No. [illegible] OFFICIAL EXHIBIT NO. [illegible]
Disposition: Identified / Received / Rejected
In the matter of [illegible] LINDEN LUMBER COMPANY
Date [illegible] Witness [illegible] Reporter [illegible]
No. Pages /

TRUCK DRIVERS UNION #413

_____

_____

_____

_____

Er 3

GC #8

We, the undersigned employees of Linden Lumber Co., want Truck Drivers Union, Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, to represent us for the purposes of collective bargaining with respect to our wages, hours and working conditions at Linden Lumber Company. Each of us has voluntarily attended the meeting at which this is being signed. Each of us has voluntarily signed this. Each of us believes the company would not want us to join Truck Drivers Union, Local No. 413.

E. Norman B.A.

Bill A Plant

NATIONAL LABOR RELATIONS BOARD

Docket No. OFFICIAL EXHIBIT NO.

Disposition: Identified / Received / Rejected

In the matter of

Date Witness Reporter

No. Pages

Ex 2

Truck Drivers Union, Local No. 413 hereby requests that Linden Lumber Company recognize this union as the collective bargaining representative of its employees in the following unit:

All Truck Drivers, Warehousemen, Production and Maintenance employees and Yard Men at its facility at 1850 Denune Avenue, Columbus, Ohio, excluding office clerical employees, guards and supervisors as defined in the National Labor Relations Act.

We hereby also ask the Company to set a date when bargaining for a contract can start.

As proof of our majority status, attached is a petition signed by a majority of your employees in the above unit.

We believe employees Marsh and Schafer belong in the unit. However, if the Company disagrees, the union is willing to let the N.L.R.B. decide the question after the Company recognizes the Union as the representative of the employees in the above unit.

Ex 1 H. Norman B.A.

NATIONAL LABOR RELATIONS BOARD
Docket No. 8-CA-4884 8-CB-1284 OFFICIAL EXHIBIT NO. GC 10
Disposition: Identified ___ Received ✓ Rejected ___
In the matter of Linden Lumber Co
Date 12-4-67 Witness Norman Reporter Lewis
No. Pages 1

Rector and Associates

2772 Manchester Ave., N. W.
North Lawrence, Ohio
Telephone: Massillon, Ohio 833-6868

Labor Relations Counselors
COMPLETE MANAGEMENT SERVICE SINCE 1938

NATIONAL LABOR RELATIONS BOARD
Docket No. 9-CA-4357 OFFICIAL EXHIBIT NO. GC #11
Disposition: Identified ✓ Received ✓ Rejected
In the matter of Linden Lumber Co.
Date 2-3-67 Witness Norman Reporter Ware

February 6, 1967

Mr. Don Norman
Truck Drivers Union
Local 413
233 South High Street
Columbus, Ohio 43215

Re- your request for recognition as bargaining agent for the employees of Linden Lumber Co.

Dear Mr. Norman:

The Linden Lumber Company has forwarded to me certain papers which you delivered to it on Monday February 6,1967.

The company refuses to recognize your union as bargaining agent because your membership includes supervisors, within the meaning of Section 2 of the Act., who influenced and dominated employees of the proposed unit. This position was made clear by the company at the NLRB hearing February 3,1967 in case NO. 9-RC-7096. Your union had the opportunity to prove its clairs before NLRB but withdrew its petetion. Therefore, the company can not recognize your union so long as the supervisory influence exists. To do so would be in violation of Section 8 (a)(2) of the Act., because any signatures you may have obtained under this influence would not be legal.

The Linden Lumber Company has never taken any position contrary to the labor act. Therefore, your clair that certain employees believe the company would not want them to join your union is hardly relevant to the issues.

The company also informs me that your union threatened to strike. Therefore, I must inform you that if there is a strike, at this time, both your union and the supervisors in question will be liable to suit for damages.

I agree that the NLRB should decide this matter. However, the NLRB is powerless to rule because your union withdrew its petetion.

I trust this explains the matter.

Respectfully yours

RECTOR & ASSOCIATES

Harvey B. Rector
For Linden Lumber Co.

HBR/vah

FEB 07 1967

FX-11 R. Norman B.A.

GC #11 51

SUPREME COURT OF THE UNITED STATES

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ORDER ALLOWING CERTIORARI. Filed April 22, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 73-1234 and a total of one hour is alloted for oral argument.

Supreme Court, U.S.
FILED
JUL 11 1974
MICHAEL RODAK, JR., CLERK

APPENDIX
VOLUME II
(WELDER MANUFACTURING COMPANY, INC.)

Supreme Court of the United States
October Term, 1973

No. 73-1251

LEEDOM LUMBER, DAVIDSON, SHERMER & Co.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

No. 73-1254

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

TRUCK DRIVERS UNION LOCAL NO. 413, AND
TEAMSTERS WELFARE UNION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

No. 73-1234

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

TRUCK DRIVERS UNION LOCAL NO. 413, AND
TEXTILE WORKERS UNION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Textile Workers Union of America

Case No.: 2-CA-10823

11. 4.65	Charge filed
1.31.66	Complaint & notice of hearing, dated
2.10.66	Respondent's answer received
3.22.66	Respondent's demand for bill of particulars, received
3.29.66	General Counsel's opposition to motion and bill of particulars, dated
3.30.66	Order rescheduling hearing, dated
3.31.66	General Counsel's letter advising that General Counsel will move to amend complaint, dated
4. 8.66	Trial Examiner's order denying Respondent's motion for bill of particulars, dated
4.27.66	Order rescheduling hearing, dated
4.28.66	Petitioners' Motion for reconsideration, dated
5. 9.66	Amended complaint & notice of hearing, dated
5.19.66	Respondent's answer to complaint & request for bill of particulars, received
5.20.66	General Counsel's opposition to motion for bill of particulars, dated
5.31.66	Trial Examiner's order denying Respondent's request for bill of particulars, dated
6. 7.66	Hearing opened
7. 1.66	Hearing closed
9.22.66	Trial Examiner's Decision issued
11.28.66	Employer's exceptions, received

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES—Continued

10.21.68	Decision and Order isued by the National Labor Relations Board, dated
10.25.68	Petitioner's Motion for reconsideration and request for oral argument, dated
12.18.68	Board's Order denying motion for reconsideration and request for oral argument, dated
8.27 70	Supplemental Decision and Order issued by the National Labor Relations Board, dated
3. 7.72	Employer's request for oral argument, dated
3. 9.72	Employer's statement of position received
8.21.72	Board's Second Supplemental Decision and Order, dated
9.13.73	Decision and Judgment of Court of Appeals for District of Columbia Circuit
10.11.73	Linden Lumber Company's Petition for rehearing received
11. 6.73	Court's order denying petition for rehearing
4.22.74	Order of Supreme Court granting Certiorari

[1]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Second Region

Case No. 2-CA-10823

In the Matter of:

ARTHUR F. DERSE, SR., PRESIDENT AND
WILDER MFG. CO., INC., RESPONDENT

and

TEXTILE WORKERS UNION OF AMERCIA,
AFL-CIO, CHARGING PARTY

Municipal Building, Port Jervis, New York,
Tuesday, June 7, 1966.

Pursuant to notice, the above-entitled matter came on for hearing at 1:00 o'clock p.m.

BEFORE:

LOWELL GOERLICH, ESQ., Trial Examiner.

APPEARANCES:

RAYMOND GREEN, ESQ.

—and—

WINIFRED MORIO, ESQ.

745 Fifth Avenue, New York, New York, counsel for the General Counsel.

JOSEPH S. ROSENTHAL, ESQ.

Messrs. Friedlander, Gaines & Ruttenberg, 221 West 57th Street, New York, New York 10019, appearing on behalf of the Respondent.

JACK RUBINSTEIN

New York State Director, 99 University Place, New York, New York, appearing on behalf of the Charging Party.

[2] SY COHEN

602 Warren Street, Hudson, New York, appearing on behalf of the Charging Party.

• • • •

[11] TRIAL EXAMINER: On the record.

MR. GREEN: Will counsel for Respondent stipulate that General Counsel's Exhibits 2A through 2D for identification was sent and received by the company? By Mr. Rubinstein.

MR. ROSENTHAL: The company will acknowledge that we received the letters which you have marked 2A, B, C and D for identification. Of course, we must point out that the statements contained in those letters are in no way binding on us as being written by the Union.

I would also like to point out that I will stipulate only that we received those letters, not what they signify or state.

TRIAL EXAMINER: Very well.

Are you offering these letters?

MR. GREEN: I am offering these as General Counsel's Exhibits 2A through 2D.

TRIAL EXAMINER: General Counsel's 2A through 2D are admitted into evidence.

[12] (Thereupon, the documents heretofore marked General Counsel's Exhibits 2A-D for identification were received in evidence.)

TRIAL EXAMINER: Mr. Rosenthal, is there any response to the letters?

MR. ROSENTHAL: No written response, sir.

TRIAL EXAMINER: Very well.

• • • •

[22] JACK MUNOZ

a witness called by and on behalf of the General Counsel, having been duly sworn, testified as follows:

TRIAL EXAMINER: Be seated and give us your full name.

THE WITNESS: Jack Munoz.

TRIAL EXAMINER: Your address.

THE WITNESS: Neversink Drive R.D. 2, Port Jervis, New York.

DIRECT EXAMINATION

Q (By Mr. Green) By whom are you employed, Mr. Munoz?

A Skydyne, Incorporated.

Q Before Skydyne by whom were you employed?

A Wilder Manufacturing.

Q For how long were you employed by that company?

A Six years and two months.

Q As of October 12th were you employed at Wilder Manufacturing Company?

A I was, yes, till 10:30 in the morning.

Q In what capacity?

A Machine operator.

[23] Q Which department is that?

A On the machine, machine department.

Q When, if ever, did you cease working for Wilder?

A October 12th, last year.

Q When did you start—when, if ever, did you start working for Skydyne?

A March 7th this year.

Q What were you doing in the interim?

A I was picketting.

Q I wonder if you could describe the physical layout of the plant, of Wilder's plant, I'm sorry.

A We have the main office—

TRIAL EXAMINER: What is the purpose of that, Mr. Green?

MR. GREEN: I think for the purpose of unit we should spell out the physical layout, give us some idea.

TRIAL EXAMINER: As I understand the position of Mr. Rosenthal– I would like to have you correct me—the only objection he has to your unit is the fact that you have excluded plant clericals.

MR. GREEN: I don't think that—

MR. ROSENTHAL: Just a second. I think I will have to correct you. I did not mean to give that impression.

I do have another objection to the unit, sir, and that is that they have apparently excluded a group of employees whom they refer to as draftsmen. Now, I know which employees [24] they mean. I am not about to concede that these people are draftsmen in the usual sense of the word. However, it is our position that the individuals to whom the General Counsel refers most certainly should be included in any appropriate bargaining unit.

TRIAL EXAMINER: Very well, let's go off the record a minute.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

As I understand, Mr. Rosenthal, in any appropriate unit you agree that maintenance and production employees should be included.

MR. ROSENTHAL: That is correct.

TRIAL EXAMINER: All right, you may put in evidence in regard to—I take it also that you would not object to the exclusion, Mr. Rosenthal, of office clericals, guards and watchmen, professional employees and supervisors as defined in the Act?

MR. ROSENTHAL: That is correct, sir.

TRIAL EXAMINER: I will allow you to go into the question of whether plant clericals and draftsmen should be excluded, Mr. Green.

MRS. MORIO: Mr. Trial Examiner, could I just say this for the record—

TRIAL EXAMINER: Of course.

[25] MRS. MORIO: We would like to know if the Respondent is prepared to state how many people are office clericals for the record so it may be just a matter of numbers that we are discussing first off. When you say that we don't have to or we are limited to showing plant clericals—

TRIAL EXAMINER: Let's go off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

MR. ROSENTHAL: Mr. Examiner, in the off-the-record discussion the General Counsel and I reviewed the October 12th payroll list and we are prepared to stipulate with regard to the eligibility and ineligibility of various employees to be included in an appropriate unit.

At this point, however, I would like the reporter to mark for identification a list of 30 employees as Respondent's Exhibit 3.

(Thereupon, the document above described was marked Respondent's Exhibit 3 for identification.)

MR. ROSENTHAL: This is a list of all employees exclusive of the executive officers. It includes supervisors and office clericals as we will indicate. However, I think we should have some stipulation on the record that this does represent a list of employees as of October 12, 1965.

MR. GREEN: We will stipulate to that. This represents a payroll list of those employees working as of that date?

[26] MR. ROSENTHAL: On October 12, 1965, that is correct, with the exception of the executive officers. Everybody else is included on that list.

Now, I think the best way to handle this is just to go down the list and take each employee separately and indicate what our position is.

Roger Burcham both parties agree is a production employee included in the unit.

Dominick Caliciotti, also a production employee included in the unit.

There's a difference of opinion as to the status of Earl Clerk. The Respondent's position is that Earl Clark should be included, General Counsel's position is that he should be excluded.

Jean Clark, the parties agree, is an office clerical and excluded from the unit.

William DeGraw we have already stipulated is a supervisor and excluded from the unit.

James Ehre is a production employee included in the unit.

Yvonne Flannery and Carol Forbes are in conflict. The General Counsel maintains that both employees are ineligible to be included in the appropriate unit, the Respondent's position is that both of these employees should be included.

Frank Griffin, included, production employee.

[27] Shirley Hawkins, excluded, office clerical.

Helmut Hernsdorf, Fred Hicks, Irving Hughson, all three included as production employees.

Harold Lauer there is a conflict on. The Employer contends he should be included, the General Counsel excluded.

Harmon Masker, production employee, included.

Frank May, conflict. The Employer's position is that he should be included, General Counsel's position excluded.

Jack McCaslin we already stipulated is a supervisor and excluded.

The following employees are all included by consent of both parties as being production employees: Michael Malloy, Jack Munoz, Joseph Munoz, Arthur O'Hara, Don Shafer, Charles Shaw, Allen Smith; Patricia Somarelli excluded, office clerical, both parties agree, James Stempert included as a production employee.

Chester Swingle there is a conflict on. The Employer contends he should be included, the General Counsel contends he should be excluded.

Frank Tonkinson and Harold Vandermark, both included by consent of both parties as production employees.

James Wharton there is a conflict on. The Employer claims he should be included, the General Counsel excluded.

With that stipulation I offer into evidence Respondent's Exhibit 3.

[28] TRIAL EXAMINER: Is the stipulation acceptable to General Counsel?

MRS. MORIO: Mr. Trial Examiner, the stipulation as stated is acceptable by the General Counsel.

TRIAL EXAMINER: Mr. Rubinstein, is it acceptable to the Charging Party?

MR. RUBINSTEIN: It's accepted.

TRIAL EXAMINER: Hearing no objection to the admission of Respondent's Exhibit 3, Respondent's Exhibit 3 is admitted into evidence.

(The document heretofore marked Respondent's Exhibit 3 for identification was received in evidence.)

MR. GREEN: Mr. Trial Examiner, we would like to ask counsel for the Respondent for a stipulation with respect to the duties, functions, time, hours, rates of pay, supervision of the production and maintenance employees as compared to the people who we allege as draftsmen and those people whom we allege as office clericals. I don't think that—we believe that we have to make—

TRIAL EXAMINER: I do not think I would require the Respondent to answer a question of that character. It seems to me at this point the only issue which is open, the only issues which are open are the issues on unit, the issues with respect to those employees which the Respondent desires to [29] have included or excluded from the unit.

I would suggest that you proceed to put proof in in regard to the job duties of specific employees which appear on the list whom the Respondent either claims to be included or excluded and which is the difference between the Respondent's position and your position.

• • • •

[59] CONTINUED DIRECT EXAMINATION

Q (By Mr. Green) Mr. Munoz, do you know a man named William Hissam?

A Yes, I do.
Q Who is he?
A He's a representative of the Textile Workers Union of America.
Q When, if ever, did you first meet this Mr. Hissam?
A October 10, 1965.
Q Where did you meet him?
A My house.
Q Will you tell us briefly what happened at that meeting.
A Well, it was about 7:00 o'clock. He came up to my house and he said if we were interested in getting a union at Wilder, and I told him "Yes."
I told him the conditions at the shop and where each man worked, and we made an appointment for a meeting at his house on Monday night.
[60] First I said I'd have to ask the fellows if they wanted a union, so the following day I went to the plant and asked the fellows, and they said, "Yes," they would be interested in a meeting, so that night we had a meeting at Bill Hissam's house. That was October 11th.
Q Do you remember which employees attended that meeting?
A Yes.
Q Could you name them? State their names, please.
A Harold Vandermark, Charles Shaw, Mike Malloy, myself, Jack Munoz, Freddie Hicks, Art O'Hara, James Stempert, Dominick Caliciotti, Harmon Masker, Joseph Munoz.
Q Yourself?
A I already said.
TRIAL EXAMINER: Let's go off the record a second.

(Discussion off the record.)

TRIAL EXAMINER: On the record.
Q Do you know Michael Malloy?
A I mentioned Michael Malloy.
Q Was he present at that meeting?
A Yes, he was.
Q Will you describe for me what took place at that meeting.

A Well, first thing we did, we signed recognition cards.
MR. ROSENTHAL: Objection.
TRIAL EXAMINER: Overruled.
[61] MR. ROSENTHAL: Mr. Examiner, let me give my reason, as long as you are going to overrule me.
He is testifying as to what was written on a particular card, and I submit that is not the best evidence without the reproduction of the card itself.
TRIAL EXAMINER: I assume technically you are right.
Perhaps General Counsel should produce cards.
Q Mr. Munoz, why don't you sort of start from the begnning and tell us what you remember happened at that meeting. Why don't you just describe it.
A Got to Bill's house about 7:00 o'clock, all eleven of us, and sat down, started discussing conditions of the plant, the merit system, the pay, we wanted a fan put in one day because there was smoke all over the place, nothing was done about it, we weren't satisfied with wages, and especially the merit system.
Q What is that?
A A system if you come in late or sick they take it out of your vacation pay. We weren't satisfied with that.
MR. ROSENTHAL: I am going to object on the grounds that this is all hearsay and irrelevant.
TRIAL EXAMINER: I will allow his testimony to stand. It does not have much probative weight, I don't think.
Go ahead.

• • • •

[64] Q Mr. Munoz, did you sign a card for the Textile Workers Union of America?
A Yes.
Q Did you read the card before you signed it?
A Yes.
Q I show you General Counsel's Exhibit 4A for identification, ask you if that is your signature.
[65] A Yes.

Q I ask you to look at the date on the top right-hand corner. Is that the date you signed it?
A October 11, 1965, yes.
Q You mentioned that Bill Hissam handed out some cards. Are these the ones?
A Yes.
Q To whom did he hand it out, do you remember?
A Everyone who was at the meeting.
Q Did you sign it of your own free will?
A Yes, I did.
Q Were you told what this card was for?
A Recognition of the Union.
Q Will you describe what, if anything else, happened at that meeting. After you signed your card.
MR. GREEN: I offer General Counsel's Exhibit 4A into the record for evidence.
TRIAL EXAMINER: Is there any objection to the admission of General Counsel's 4A?
MR. ROSENTHAL: May I see it, please.
May I examine this witness?
TRIAL EXAMINER: Voir-dire, you may.

VOIR-DIRE EXAMINATION

Q (By Mr. Rosenthal) Mr. Munoz, in whose handwriting is the word Wilder Manufacturing, Inc.?
[66] A Mr. Hissam.
Q Mr. Hissam also write the date on here?
A I did.
Q When did you write the date on here?
A That night.
Q Before you signed it or after you signed it?
A Before.
TRIAL EXAMINER: Do I hear an objection?
MR. ROSENTHAL: No objection.
TRIAL EXAMINER: General Counsel 4A is admitted into evidence.

(The document heretofore marked General Counsel's Exhibit 4A for identification was received in evidence.)

Q (By Mr. Green) Mr. Munoz, could you tell us what, if anything else, was said at that meeting.
A We also signed a pad agreeing that—
MR. ROSENTHAL: Objection.
TRIAL EXAMINER: Just a minute.
Go ahead and finish your answer.
A We also signed a pad stating that that if we weren't recognized we would strike the next day.
MR. ROSENTHAL: I move the witness's answer be stricken, not the best evidence and irrelevant and immaterial.
TRIAL EXAMINER: I will let that part stand indicating that they signed a pad. The rest may be stricken.
[67] MR. GREEN: Will you please mark this as General Counsel's 5 for identification.

(Thereupon, the document above described was marked General Counsel's Exhibit 5 for identification.)

Q Mr. Munoz, you said you signed a pad. I show you General Counsel's Exhibit 5 for identification and ask you what this piece of paper is.
A That's the strike that we took, that's what we signed, if we didn't have recognition we would strike.
Q Is your signature on that any place?
A Yes, the third from the bottom.
Q The date on top, "10/11/65," is that the date you signed it?
A Yes, it is.
Q Did you see anybody else sign it?
A Yes.
Q Who?
A Most everybody. I saw everybody sign it.
Q What was the date they signed it?
A 10/11/65.
MR. GREEN: I offer this as General Counsel's Exhibit 5.

VOIR-DIRE EXAMINATION

Q (By Mr. Rosenthal) Mr. Munoz, is this your handwriting at the top of this document?
A No, it's not.
[68] Q Who wrote that?
A My brother, Joseph Munoz.
Q You signed this somewhere down the bottom, third from the last?
A That's right.
Q Did your brother take this around and have everybody sign it?
A No, it was passed around.
Q You did not physically witness that, did you?
A Yes, we were sitting at a table.
Q You saw each person sign something on the paper but you didn't observe them write their name on the paper?
A Yes, I did.
Q Where were you sitting?
A Right across on one side of the table.
Q There were eleven of you sitting around this table?
A That's right.
Q Where was Mr. Stempert sitting, for example, in relation to where you were sitting?
A I don't remember where he was sitting. That
Q You don't rember actually seeing him sign?
was eight months ago.
his name; is that correct? You don't know whether Mr. Stempert signed it—
A He must have signed it, it's on there, isn't it?
Q You did not see Mr. Stempert sign his name; is that cor- [69] rect?
A I saw him sign something, yes.
Q But you did not see him physically sign James E. Stempert, someone else may have done that and you would not know; is that correct?
A I doubt it.
MR. ROSENTHAL: I object to this document for anything other than Mr. Jack Munoz signed it and I have a further objection to the entire document on

the ground that it is irrelevant and immaterial to the issues in this case.
TRIAL EXAMINER: What is the purpose of your offer, Mr. Green?
MR. GREEN: Well, first of all, it is part of what happened at the meeting. Second of all, it goes into the element of non-coerced majority and we want to show that these people had that kind of feeling that they felt that they would strike if they had to.
TRIAL EXAMINER: Mr. Munoz, how did this matter come up, the signing of the paper? How did you come to sign it?
THE WITNESS: Well, we agreed.
TRIAL EXAMINER: What happened just before you agreed? What was the conversation?
THE WITNESS: After we signed the cards we signed that paper saying that we would strike if we weren't recognized.
TRIAL EXAMINER: Was there some discussion about it?
[70] THE WITNESS: Yes, we discussed it and we all agreed.
TRIAL EXAMINER: What was the discussion?
THE WITNESS: That we would strike if we weren't recognized.
TRIAL EXAMINER: Was there some kind of poll taken, a vote?
THE WITNESS: Yes, we did, we took a vote on it, hand vote.
TRIAL EXAMINER: Who was conducting the vote?
THE WITNESS: Bill Hissam.
TRIAL EXAMINER: Do you recall what he said?
THE WITNESS: No.
TRIAL EXAMINER: Do you recall any comments that were made about the strike?
THE WITNESS: Well, that if we weren't recognized we would strike, and then we took a vote on it and we all agreed.
TRIAL EXAMINER: Where did this meeting take place?
THE WITNESS: Bill Hissam's house.

TRIAL EXAMINER: I will overrule your objection and admit General Counsel's Exhibit 5.

(The document heretofore marked General Counsel's Exhibit 5 for identification was received in evidence.)

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

[71] TRIAL EXAMINER: On the record.

Q Mr. Munoz, prior to the signing of this piece of paper, prior to the time you signed this piece of paper was there any discussion of background at the plant, and any prior attempt—

MR. ROSENTHAL: Objection, irrelevant and immaterial.

TRIAL EXAMINER: What is the purpose of that question?

MR. GREEN: Well, Mr. Trial Examiner, you were asking the context in which this piece of paper was signed and I want to bring that out.

TRIAL EXAMINER: Very well, you may answer the question.

A Eight years ago—I wasn't working there at the time, but I got this from the fellows that were working there.

TRIAL EXAMINER: I want you to confine yourself to what was said at the meeting, nothing more or less.

A It was agreed that we would have to act fast, because about eight years ago they tried to get a union there and the company broke majority.

MR. ROSENTHAL: Objection, Mr. Examiner, this is highly prejudicial and irrelevant, and he is only repeating what somebody else told him.

TRIAL EXAMINER: The Trial Examiner understands that this is simply what happened at the meeting.

I will permit him to recite what happened at the meeting.

A The company broke the majority and they didn't get a union.

[72] MR. ROSENTHAL: I move that that be stricken, Mr. Examiner.

TRIAL EXAMINER: I will attach no probative value to it.

MR. GREEN: All we asked the question was in relationship to the context in which this was signed anyway. I certainly do not allege what happened eight years ago is 8(a)(1) conduct by the Respondent.

I offer this into evidence as General Counsel's Exhibit 5.

Q Mr. Munoz, the morning after this meeting did you go to work?

A Yes, I did.

Q Describe what happened that morning.

A I went to work about a quarter after 7:00, 7:30 Bill Hissam pulled into the parking lot, Wilder parking lot, and I went out to talk to him. He said that Mr. Cohen, Bill, were going to go in to see the Derses.

Q Then what did you do?

A I went back in the shop.

Q What happened when you got back in the shop?

A I went to work. I went to get a drink of water, and through the office door I saw Bill Hissam and Mr. Cohen.

Q After that what happened?

A About 10:20, 10:30 I got a telephone call from Bill Hissam.

[73] Q Describe what he said to you.

A He said that they didn't want to bargain or talk to us.

MR. ROSENTHAL: Objection.

TRIAL EXAMINER: Sustained.

The answer may be stricken.

Q What happened after that?

A After Bill Hissam's telephone call? He said we'd have to walk.

MR. GREEN: It has been objected to.

TRIAL EXAMINER: I overrule that objection.

Q Go ahead.

A All the fellows, we walked out, all eleven of us, took our cars from the parking lot. Sy Cohen handed us picket signs and we started picketing.

Q Which eleven walked out?
A The ones that were at that meeting that night and signed their names on the pad.
TRIAL EXAMINER: Did anyone else walk out besides those eleven?
THE WITNESS: Not right then, no, sir.
Q Were all these eleven production and maintenance employees?
A Yes.
Q Were there any employees at that time who walked out aside from the production and maintenance employees?
[74] A No, just the eleven.
Q Then what happened?
A Sy Cohen gave us signs and we started picketing.
Q What kind of signs?
A Around our neck, "ON STRIKE, WILDER MANUFACTURING COMPANY," the local, "1410, TEXTILE WORKERS OF AMERICA."
Q Where did you picket?
A The Wilder parking lot.
Q Which is about how far away from the front entrance, would you say?
A The front entrance?
Q Yes. How would you describe it?
A It's right on the side of the plant.
Q About how many feet?
A Well, the whole parking lot runs—starts at the end of the plant and runs all the way down.
TRIAL EXAMINER: Did all eleven of you picket?
THE WITNESS: Yes, sir.
Q By the way, as you go—
TRIAL EXAMINER: Excuse me.
How did you picket?
THE WITNESS: We walked in front of the parking lot.
TRIAL EXAMINER: All eleven of you?
THE WITNESS: Yes.
TRIAL EXAMINER: How long did you picket?

[75] THE WITNESS: That whole day.
TRIAL EXAMINER: What did the signs say?
THE WITNESS: What did it say?
TRIAL EXAMINER: What did the signs say?
THE WITNESS: "ON STRIKE, WILDER MANUFACTURING COMPANY, LOCAL 1410, TEXTILE WORKERS OF AMERICA."
Q Was everyone walking for the entire day or were there some breaks?
A Some rested and some walked.
Q Up until what time did everyone walk?
A That night?
Q No, from the time you walked out of the plant.
A Well, we took turns.
Q Right from the beginning, did eleven of you walk right from the very beginning?
A We all walked.
Q The first day?
A Yes, some rested and some walked. We split it up.
Q Was there some point where you split it up or did you split up from the beginning?
A No, at one point we split up.
Q One hour you all walked together, two hours, three hours?
A Yes.
Q Which one?
[76] A Three hours.
Q I wanted to ask you: If you drove a car into that street where the plant is is there more than one way to get into that plant, to drive a car into that plant?
A Yes, there's two ways.
Q From the front entrance is there a railroad track that goes—
A There's a railroad track.
Q You could not come past it that way?
A No.
TRIAL EXAMINER: At any time you were picketing did you see Mr. Derse?
THE WITNESS: Which one, sir?

TRIAL EXAMINER: The one who is sitting at the table.

THE WITNESS: Yes.

TRIAL EXAMINER: All right, go ahead.

Q Did you have any occasion to see any of the other brothers?

A Yes.

Q By the way, who are the brothers?

A Robert Derse, Arthur Derse, Jr., Walter Derse.

Q Let's take Arthur Derse, Jr. Was there any time during that day that you happened to see him?

A I saw him late that night.

Q Late that night?

[77] A I don't know the exact time, maybe 6:00, 7:00 o'clock.

Q When you saw him what was he, in a car, walking, what?

A He came in a car, he pulled up in his car, opened the trunk and took a suitcase out.

Q Suitcase out?

A Yes.

TRIAL EXAMINER: Does the Respondent claim it had no knowledge that eleven of its employees were picketing on that date?

MR. ROSENTHAL: My client advises me that we knew that eleven of our employees had walked out of the plant, but we did not know that all eleven were picketing and that should be established.

TRIAL EXAMINER: Very well, go ahead.

Q What kind of car would you say—what kind of car does Arthur Derse, Jr. drive?

A It was a Dodge.

Q Any particular color?

A It was a tan color.

Q What did he do when he drove it in?

A Backed in, went back, opened the trunk, took out the suitcase and went in the front entrance.

TRIAL EXAMINER: How many employees were on the picket line when he went through the picket line?

THE WITNESS: I don't remember right then, sir.

[78] TRIAL EXAMINER: All right, go ahead.

Q At about, I guess, between 5:00 and 6:00—did you notice anything else that night, was the plant lit up or—

A Yes, about 8:00 o'clock the Derses came back that night.

Q Which of them?

A All of them.

Q You saw all of them?

A Yes.

Q Where did they go?

A In the office.

Q How did you know they went into the office?

A Well, the lights were on in the front office.

Q Were the lights on in the rest of the plant?

A No.

Q It was dark in the rest of the plant?

A Yes.

Q Was it light out or dark out when they came back?

A Quite dark.

Q Was the floodlight on—

A Yes, floodlight on in the parking lot.

Q Until about what time that night did you picket to?

A I stayed until about 11:00 o'clock.

Q Do you know Arthur Derse, Sr.?

A Yes.

Q Did you see him that night?

[79] A Saw him that day.

Q That night.

A Yes.

Q About what time?

A About 8:00 o'clock, a little after, maybe.

TRIAL EXAMINER: When there were eleven of you on the picket line at any time did you see any of the Derse brothers?

THE WITNESS: Yes.

TRIAL EXAMINER: All right.

Q You mentioned you saw them at 8:00 o'clock. Did you see them leave? The Derses.

A Yes.

Q All of them?

A I guess so, yes.

MR. ROSENTHAL: Mr. Examiner, I think General Counsel should try not to lead the witness in sensitive areas. I think a question like that is improper.

TRIAL EXAMINER: I might say this, as I do occasionally, that obviously an individual has to make a decision about credibility of witnesses is helped very little by leading questions.

Q At the time you saw—well, at 8:00 o'clock, between 8:00 and 9:00, the time you saw all of the Derses, who, if anybody, besides yourself was on the picket line?

[80] A Art O'Hara was on the picket line.

Q What about the others?

A There was others, but I don't remember who they were.

Q Was that October?

A Yes, October.

Q About 8:00 o'clock were you standing outside?

A I was outside.

Q Do you recall if anybody else was standing outside?

A There were some in cars.

MR. ROSENTHAL: Objection, counsel is leading the witness again.

TRIAL EXAMINER: Sustained.

Q Did you go back to the plant the following morning?

A About 7:00 o'clock, 7:30.

Q What did you do then?

A I picketed.

Q Who, if anybody else, was there with you?

A There were the eleven of us plus Helmut Hernsdorf.

TRIAL EXAMINER: Who was the individual who was added to the picket line?

THE WITNESS: Helmut Hernsdorf was there.

TRIAL EXAMINER: Is he an employee of the company?

THE WITNESS: Yes, sir, he was.

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

[81] TRIAL EXAMINER: On the record.

You are speaking about the picket line on October 13th?

THE WITNESS: October 13th, yes, sir.

Q Twelve of you came down to the plant; is that correct?

A Yes.

Q What, if anything, did you do when you came down there?

A We picketed.

Q During the time you picketed that morning, which, if any, of the Derses did you see drive in?

A I saw Bob Derse, Walt Derse.

Q Please repeat that.

A Bob and Walt Derse.

TRIAL EXAMINER: Was Hernsdorf on the picket line at the time they drove in?

THE WITNESS: Yes.

Q How long thereafter did you picket? I mean, not that day.

A All the time till I went to work at Skydyne.

Q About how long was that?

A Five months.

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[84] Q What percentage of time did you, if you picketed, spend of those five months? You said you did not picket every day.

A I'd say 75 per cent of the time.

TRIAL EXAMINER: Was there some kind of schedule set up for pickets?

THE WITNESS: Yes, we took turns.

TRIAL EXAMINER: How often did you do duty?

THE WITNESS: Once a day, sometimes twice a day. Some- [85] times I was off on a Saturday or Sunday.

TRIAL EXAMINER: During the entire period did all of the 12 individuals continue to picket?

THE WITNESS: Pardon?

TRIAL EXAMINER: Did all of the 12 individuals continue to picket?

THE WITNESS: For the first two weeks I'd say, yes. Then we broke it down. We broke it down.
TRIAL EXAMINER: What do you mean, you broke it down?
THE WITNESS: Teams.
TRIAL EXAMINER: Teams?
THE WITNESS: Yes, groups.
TRIAL EXAMINER: Groups?
THE WITNESS: Yes.

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[108] JACK RUBINSTEIN

a witness called by and on behalf of the General Counsel, being duly sworn, testified as follows:

TRIAL EXAMINER: State your name.
THE WITNESS: My name is Jack Rubinstein.
TRIAL EXAMINER: And your address?
[109] THE WITNESS: My address is 99 University Place, New York City.
TRIAL EXAMINER: You may proceed, Mr. Green.

DIRECT EXAMINATION

Q (By Mr. Green) By whom are you employed, Mr. Rubinstein?
A I am employed by the Textile Workers Union of America as its New York State director.
Q How long have you been employed in that capacity or by that union?
A About 30 years.
Q How long in that capacity? That specific capacity.
A Since 1940.
Q Are you familiar with the Wilder Manufacturing Company?
A Yes, I'm familiar with it.
Q When did you first become familiar with that company?

A In the early part of October, about the 8th or 9th I was made aware of the fact that there was an interest on the part of the workers for joining the union.
MR. ROSENTHAL: Objection, move that the witness's answer be stricken as hearsay.
TRIAL EXAMINER: No, I will let it stand.
Go ahead.
Q Do you know a man named Walter Derse?
A Can't say I know him, I've seen him, talked to him once [110] or tried to.
Q Describe what happened on that particular occasion. When did it happen?
A On or about October the 25th. I came up to Port Jervis for the purpose of trying to meet some of the principals of the company to see if we could do something to settle the strike. I was standing alongside of the gate where the strikers picket tent was set up, and I talked with Mr. Hissam and Mr. Cohen and I said, "Is anyone in the plant," and they told me, "No."
They said—I was told that the management people were out for lunch.
Stood around a while, and then two or three people said, "There's Walter Derse coming now."
He drove through the gate, parked his car and at that time I said, "Let's go and see if we can talk to him."
Q By the way, can you pick out Walter Derse? Is he in this room?
A Yes, he's in this room right now.
Q Please point to him.
A This is the gentleman sitting over here to my left.
MR. GREEN: I would like the record to show that Mr. Rubinstein pointed to the man sitting next to counsel for the Respondent and identified him as Walter Derse.
Q Go ahead.
[111] A I approached Mr. Walter Derse and Mr. Sy Cohen and Hissam were with me. All three of us approached him.
I stepped up to Mr. Derse, and I said, "My name is Jack Rubinstein, and I represent the Textile Workers Union of America, and I would like to talk to you."

A little fumbling took place, and I said, "How about inviting me into your office?"

Mr. Derse says, "I can't talk to you."

I said, "How about recognizing our union?"

He said, "No comment."

With that he stuck his hand in his pocket and pulled out a little slip of paper and said, "These are my attorneys. Talk to them."

I said, "How about my talking to you?"

He shrugged his shoulders and said, "No comment."

After that he continued moving on, and the only way I could get to talk to him would be by grabbing him, and I knew that would be impolite, so the conversation ended.

Q That was all that was said?

A What?

Q That was all that was said?

A That was basically all that was said that I can remember at this moment.

MR. GREEN: Would you mark this for identification as General Counsel Exhibit 6 for identification.

[112] (Thereupon, the document above described was marked General Counsel's Exhibit 6 for identification.)

TRIAL EXAMINER: Did you contact the attorneys?

THE WITNESS: Tried to.

Q I show you General Counsel's 6 for identification. I ask you to identify it.

A Yes, this is a slip of paper that Mr. Derse gave me, but there is a little slip over it which I done some scribbling on the bottom, but this is the slip that was given me.

Q It was attached to a piece of paper?

A That's correct.

MR. GREEN: All right, I would like to introduce this as General Counsel Exhibit 6.

TRIAL EXAMINER: Did you state a definite date?

THE WITNESS: This day that I approached him that he handed me this, I think it was about the 25th of the month.

TRIAL EXAMINER: 25th of what month?

THE WITNESS: The strike took place. October, I believe it was.

TRIAL EXAMINER: Is this the demand you referred to in your complaint, paragraph 9?

MRS. MORIO: I'm sorry, Mr. Trial Examiner.

TRIAL EXAMINER: Is this the demand you referred to in your complaint as occurring on October 25th?

MRS. MORIO: That's right, Mr. Trial Examiner.

[113] TRIAL EXAMINER: Do you have any objection?

MR. ROSENTHAL: No objection.

TRIAL EXAMINER: Very well, General Counsel 6 is admitted.

(The document heretofore marked General Counsel Exhibit 6 for identification was received in evidence.)

Q Did you contact these attorneys?

A A day or two later I called the office of Friedlander, Gaines and Ruttenberg and I asked for Mr. Ruttenberg, and I said to him, "I'd like to get together with you to see if we can't settle this strike—" correction. I first identified myself to the party that answered the call and told him I was the representative of the Textile Workers Union of America, gave him my name, told him I was talking to him about the strike that was in progress at Port Jervis, New York at the Wilder Manufacturing Company, and expressed a desire to sit down and talk over a settlement of this whole situation.

He told me he was very busy and what's more he had not received any instructions from his client, and under the circumstances he didn't see any point in meeting. In addition to that he told me the company was very busy. I believe he made reference to a campaign of the taxi workers that was taking place then in New York.

Q Did this person identify himself to you?

[114] A I understood it to be Mr. Ruttenberg that I was talking to. I may have been mistaken, it may have been Mr. Rosenthal, I don't know.

Q Did you leave a number for him to call you?

A Yes, I left my number.
Q Did you ask him to call him back? Ask him to call you back.
A Yes, I didn't ask that way, I said, "If you learn anything please let me hear from you."
MR. ROSENTHAL: Can we have a few less leading questions? After all, you should not have to lead Mr. Rubinstein.
TRIAL EXAMINER: When a leading question is posed and you have an objection to it I would appreciate it if you state it at that time.
MR. ROSENTHAL: I anticipate another one.
Q When, if ever, did you have any further contact with any of the company attorneys?
A I think about sometime in November I again called. I then asked who was handling the Wilder case. I believe a Mr. Cohen answered the phone, and I again raised the question of the possibilities of getting down and sitting down and talking about a settlement, and he was very unresponsive. He said he didn't know what the company wanted to do, and I says, "When you find out let me know."
Q Did he mention anything else during that conversation?
[115] A I think there was some talk about having seen an advertisement in the newspaper in which my name had appeared.
Q Did he ever call you back?
A Never called me back, neither of the attorneys called me.

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[187] CHARLES LINCOLN SHAW

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Will you state your full name and your address?
THE WITNESS: Charles Lincoln Shaw, 12 First Street, Port Jervis, New York.

DIRECT EXAMINATION

Q (By Mr. Green) Mr. Shaw, by whom are you employed?
A Wilder Manufacturing.
Q For how long have you been employed?
A About ten years.
Q About ten years?
A Yes.
Q In what capacity are you employed by that company?
[188] A Punch press operator.
Q Did you ever sign a card for the Textile Workers Union of America?
A That's right, I did.
Q I show you General Counsel's Exhibit 4-J for identification and ask you to identify that.
A It's my signature.
Q That is your signature?
A That's right.
Q What date is it? What is the date you signed it?
A October 11, 1965.
Q Is that in your handwriting? The date?
A It looks like it, yes.
MR. GREEN: I offer this card into evidence as General Counsel's Exhibit 4-J
TRIAL EXAMINER: Any objection to General Counsel's Exhibit 4-J?
MR. ROSENTHAL: The only other one you have is 4-A?
MR. GREEN: Yes.
MR. ROSENTHAL: Now you are making it 4-J?
MR. GREEN: It is for identification and the witness is called out of order.
MR. ROSENTHAL: No objection.
TRIAL EXAMINER: Very well, General Counsel's Exhibit 4-J is admitted in evidence.

[189] (Document heretofore marked General Counsel's Exhibit No. 4-J for identification was received in evidence.)

TRIAL EXAMINER: Do you have any other questions of this witness?

MR. GREEN: Yes.

Q Mr. Shaw, I show you General Counsel's Exhibit 5 for identification, ask you if your signature is on that?

A Yes, sir, right there.

Q Can you identify the exhibit?

A Yes, on strike.

Q When did you sign this piece of paper, Mr. Shaw?

A I believe it was over at Bill Hissam's house.

Q When?

A I don't remember the date.

Q The same day you signed the card?

MR. ROSENTHAL: Can we have the witness testify what day it is, please, and not the General Counsel?

TRIAL EXAMINER: Your objection is well taken. Mr. Green, I sustain the objection to the question.

Q What day did you sign this?

A Possibly the same day, I am not sure.

Q The same day as what?

A As the rest of the men signed it.

Q On October 12th did you go to the plant in the morning?

A Yes, I did.

[190] Q Will you describe what happened on that morning?

A Well, went to work.

Q Did anything happen later on that morning?

A Well, phone call come back to walk out, that's all I know.

Q What did you do?

A Walked out with the rest of the men.

Q When you got outside, what did you do?

A Put on picket signs and started picketing.

Q For how long did you picket?

A All day.

Q How long thereafter did you picket?

A I was there every day picketing.

Q For how long?

A All day.

Q Did you picket just one day?

A No, every day.

Q For how long.

A The whole day long.

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[251] DOMINICK CALICIOTTI

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated. Give us your full name.

THE WITNESS: My name is Dominick Caliciotti, 1030 Graham Street, Matamoras, Pennsylvania.

DIRECT EXAMINATION

Q (By Mr. Green) Mr. Caliciotti, as of October 12th by whom were you employed?

A I was employed by the Wilder Manufacturing Company.

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[251a] MR. GREEN: I would like to introduce this card as General Counsel's Exhibit 4-F.

TRIAL EXAMINER: Any objection to the admission of [252] General Counsel's Exhibit 4-F?

MR. ROSENTHAL: No objection.

TRIAL EXAMINER: Very well, General Counsel's Exhibit 4-F is admitted into evidence.

(Document heretofore marked General Counsel's Exhibit No. 4-F for identification was received in evidence.)

Q (By Mr. Green) Where did you sign General Counsel's Exhibit 4-F? Where did you sign this card?

A The card?

Q Where? Where did you sign it?

A Right here.

TRIAL EXAMINER: He would like to know the place.

A Bill Hissam's home.

Q I show you General Counsel's Exhibit 5 in evidence, ask you if—ask you to identify what that is. Is your signature on that?

A Yes.

Q Did you sign this?

A There's my signature here and I signed it.

Q When did you sign this?

A I think if I'm not mistaken, it was around February sometime.

Q February?

Read it over carefully.

[253] A No, this is the night of the strike, that we had the strike over there.

TRIAL EXAMINER: Did you sign it before the strike commenced or after the strike commenced?

THE WITNESS: After—no, before, the day before.

Q (By Mr. Green) The day before?

A The day before.

Q Mr. Caliciotti, did you go to work on—did you go in to work on the morning of October 12th?

A Well, on October 12th, this—the man from the union, they went in the office and asking for the recognition for the union, and, of course, we all agreed if it was nothing done about it that we was to walk out.

Q What happened?

A Well, at ten—between ten-thirty and ten-forty, I would say, we got word that there was nothing done about it, so we all walked out of the plant.

Q What did you do when you walked out?

A Did you say what time?

Q No, what did you say at the time?

A Well, we checked out, naturally we walked out and went out on the street.

Q What did you do on the street when you got outside?

A We started picketing on the front of the property, on the sidewalk over there.

[254] Q For how long that day did you picket?

A Well, I picketed all the way through until about five, or maybe ten after five, in that neighborhood, and then I went home for supper.

TRIAL EXAMINER: Who else picketed with you?

THE WITNESS: Well, mostly all the men who was with us at that time, probably with the exception of maybe two or three fellows that might have went out for their supper before that.

Q (By Mr. Green) What time are you talking about?

TRIAL EXAMINER: When you first went out and commenced picketing, how many employees were on the picket line?

THE WITNESS: I am pretty sure it was fourteen.

Q I show you General Counsel's Exhibit 5 and ask you whether or not the names listed in General Counsel's Exhibit 5 were the people who walked out with you on October 12th?

MR. ROSENTHAL: I object, the witness has not exhausted his recall yet, and this should not be shown to him for the purpose of refreshing his recollection yet.

TRIAL EXAMINER: I agree with the respondent. The objection is sustained.

Q Mr. Caliciotti, can you name the people who walked out with you on October 12th, the people who walked out?

A You want the names of the people that went out—

[255] TRIAL EXAMINER: Could you also tell us whether or not the individual name was on the picket line immediately after he left the plant.

THE WITNESS: Well, there was Jack Munoz, Joe Munoz, myself, Charley Shaw, James Stempert, Michael Molloy, Harold Vandermark, Arthur O'Hara.

Q (By Mr. Green) Did James Ehre go out?

A Ehre and Hicks.

Q What did they do when they got outside?

A Oh, just started walking back and forth. Just about that time there was some trucks that came in there, and we were just walking across the picket line.

Q Were they carrying anything or wearing anything?

A No, we were just walking back and forth on the picket line. We had probably two feet, three feet, it was in between each other on the line. That's all I could say.

Q Did you have any signs? Do you recall having any signs with you?

A Yes.

Q What kind of signs were they?

A Well, we had signs about the labor union, the CIO and where the strike was at Wilder Manufacturing Company.

Q All these—we asked.

How long that day did you picket?

A That day or afterwards?

[256] Q That day.

A That day I picketed until, as I said, about a quarter after five, until I went home for supper, and then I come back an hour, I'd say an hour and a half afterwards.

TRIAL EXAMINER: Mr. Caliciotti, you named eleven individuals who were on the picket line when you first started picketing. How long did those eleven individuals continue to picket as a group. If you know?

THE WITNESS: First day?

TRIAL EXAMINER: Yes, first day.

THE WITNESS: Well, as a group of mostly up until about five o'clock, a little before. I would say just exactly all eleven men were out there, then maybe all—maybe a couple leave to have a bite to eat and then someone else will go when they come back. Then after I came back I was there until about, I would say, eleven o'clock that night.

TRIAL EXAMINER: When you were on the picket line with the ten other employees, did you at any time see any of the Derses?

THE WITNESS: I saw them in the morning, naturally, when we went to work, and then I saw them, some of them, when they went home, and then I—

TRIAL EXAMINER: Were you on the picket line at that time?

[257] THE WITNESS: I was on the picket line at the time that they were all in. That was about six-thirty or seven o'clock when they were all in. That's four, Mr. Arthur, Senior, Junior, Walter and Bob. They were there about seven o'clock.

TRIAL EXAMINER: Did they go through the picket line?

THE WITNESS: No, they went through the front office there. I wouldn't say they went through the picket line or not.

TRIAL EXAMINER: How far was that from where the picket line was conducted?

THE WITNESS: Twenty-five feet away from where we were.

TRIAL EXAMINER: Had you seen any of the four before that, while you were on the picket line earlier in the day?

THE WITNESS: Well, during the day I happened to see or glance to Bob when he went home for dinner, Walter the same way, but I didn't see Arthur until around seven o'clock that night.

TRIAL EXAMINER: Did you see McCaslin?

THE WITNESS: Yes, I saw him when he left to go home from work.

TRIAL EXAMINER: Did you see him at the other time during the day when you were on the picket line?

THE WITNESS: When he used to go back and forth, that's the only time I saw him.

[258] TRIAL EXAMINER: Would you say you saw him in the window?

THE WITNESS: There's a men's room there and a window open. Naturally when they went in the men's room they peek out through the open window.

TRIAL EXAMINER: What did you see him doing

THE WITNESS: Beg pardon?

TRIAL EXAMINER: When he—

THE WITNESS: You have to talk a little louder.

TRIAL EXAMINER: When he was at the window what did you see him doing?

THE WITNESS: They went in there to drink.

TRIAL EXAMINER: At the window, you said you saw him at the window, what was he doing when he was at the window?

MR. ROSENTHAL: Excuse me, Mr. Examiner, we got some witnesses who just walked in the room.

MR. HISSAM: He's testifying.

MR. GREEN: The first one we called. The second one I don't know who he is.

TRIAL EXAMINER: Let's go off the record for a minute.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

We were talking about Mr. McCaslin. While you were on the picket line did you see him at any time during the first day?

[259] THE WITNESS: Not morning when I went to work.

TRIAL EXAMINER: When you were on the picket line?

THE WITNESS: When I was on the picket line, as I said, I saw him going through to the bathroom, to the men's room.

TRIAL EXAMINER: Very well.

Which way was he looking when you saw him?

THE WITNESS: Eight months ago. Hard to say just which way he was looking. I don't know.

TRIAL EXAMINER: Was he looking towards the picket line?

THE WITNESS: Well, he did look out towards the picket line, yes, he did, through the open window.

TRIAL EXAMINER: Very well.

I do not think it is necessary to put any more evidence in respect to the fact there were eleven men on the picket line on October 12th, and that they were in a position where the supervision and the management could have seen them and apparently did see them, since they were in the vicinity.

I do not want any more evidence on this subject.

Q (By Mr. Green) Mr. Trial Examiner, there is an additional man, Helmut Herrnsdord.

TRIAL EXAMINER: It already got cumulative evidence on the subject.

MRS. MORIO: Mr. Trial Examiner, there is or will be [260] in issue the presence of one of the Derses at the plant on that day.

Now, several of the employees have testified—have told us that they saw this particular individual. We are not going to, if you feel the record is cumulative, at this

point, put on witnesses that all eleven of them were there that day. We would like at a point when they were there that particular day on the picket line they did observe one Derse.

MR. ROSENTHAL: Which allegation is this?

MRS. MORIO: The refusal of the company to bargain.

TRIAL EXAMINER: It seems to me the present state of the record to put on any more evidence with regard to the fact that there were any more individuals on the picket line on October 12th, and they were in a position where they would have been seen by the management, and the management was in a position to see them, would be cumulative.

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[261] Q (By Mr. Green) After this first day for how long did you picket?

A Well, I picketed until March the 11th, except for probably a few days that I was home sick, and, of course, on December 22nd that I was on the picket line a truck come in, which the truck struck me and knocked me down on the Derses' property from the sidewalk.

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[270] REDIRECT EXAMINATION

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[273] Q On October 13th, say nine o'clock—not nine o'clock, October 13th, when you started picketing, did you have occasion to see any of the Derses drive by the picket line in the morning?

[274] A We saw them drive in.

Q Which ones?

A Well, Walt and Art and Bob and Arthur, Senior.

Q Who is Art? Is Art Derse Arthur Derse?

A Arthur Derse, Senior, and Arthur Derse Junior.

Q I wish you would call Senior "Pop."

A All right.

Q At the time Walter Derse drove in about how many people were on the picket line?

MR. ROSENTHAL: Objection. What time he came, if at all.

TRIAL EXAMINER: I will allow the question.

Go ahead.

Q (By Mr. Green) You say you saw Walter Derse drive in?

A Yes.

Q When he drove in about how many people would you say or would you estimate were on the picket line?

A The majority of the men were on the picket line. How many I cannot state.

Q If you can recall, did any of the Derses drive in prior to nine o'clock on October 13th? If you remember.

A No, none of them went inside the property, only in front of the office.

Q None of them went inside the property?

I am not sure I understand what you are telling me. I [275] withdraw the question.

Did you see any of the other Derses come in that morning to work?

A Yes.

Q Who?

A Well, first I believe Walt was the first one that came in.

Q Go ahead.

A Then I believe it was Bob came in afterwards. How long in between I don't know.

Q Yes.

A And then Arthur, Junior, he come in, and I believe Pop, as you wanted to say, he was the last one to come in.

TRIAL EXAMINER: Now, I think I heard enough evidence on the Derses going in and out of the plant, and as the records stands the Trial Examiner can only find that picketing went on in front of the plant for a number of weeks and that the company operated normally and its normal operations were the Derses going in and out of the plant to the office. Any other evidence is cumulative. Unless there is evidence to the contrary it's—the Trial Examiner will probably so find.

MR. GREEN: We have no more questions at this time.

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[293] WILLIAM HISSAM

A witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: State your name, please.

THE WITNESS: My name is William Hissam.

TRIAL EXAMINER: Your address?

THE WITNESS: My address is 707 Pennsylvania Avenue, [294] Matamoras, Pennsylvania.

DIRECT EXAMINATION

Q (By Mr. Green) By whom are you employed?

A Textile Workers of America.

Q In what capacity?

A Representative.

Q For how long have you been employed by the Textile Workers of America?

A Approximately a year and ten months.

Q Are you familiar with the Wilder Manufacturing Company?

A I am.

Q How did you first become familiar with this company?

A I first became familiar with this company it was a strike at Skydyne Corporation, Port Jervis, New York, and some of the fellows told me that some of the fellows at Wiler are interested in a union.

MR. ROSENTHAL: Objection.

MR. GREEN: This is merely preliminary.

TRIAL EXAMINER: I will allow it for background. I do not think it is introduced for the truth of how he got in.

Q (By Mr. Green) Go on.

A Later I contacted a mutual friend of mine that works in A and W, who knew some of the fellows that worked there, and he told me that he would introduce me to some of the fellows, at which time, around Octo-

ber 9th, I went over to [295] his house and there I met Jack Munoz and later we went to Jack Munoz's house where I met Joe Munoz.

We discussed the situation there, they discussed what the problems were, how many people they thought would be interested in the union, and I told them that—I asked them if they wanted to set the cards up in the shop or have a meeting, and he said he would rather have a meeting, and let everybody decide at one time, rather than have him make the decision to issue cards in the shop.

So we set a date up for October 11th, at noontime, and he was supposed to call me to let me know whether we would have a meeting that night between seven and Seven-thirty, of the employees, and he would let me know what was coming.

Q Get down to the meeting. You—did you hold the meeting at your house?

A I held the meeting at my house at seven-thirty that night.

TRIAL EXAMINER: What date was it?

THE WITNESS: October 11th.

Q Who was present?

A Present at that meeting was Joe Munoz, Jack Munoz, Charley Shaw, Dominick Caliciotto, Harmon Masker, Harold Vandermark, Mike Malloy, James Stempert, James Ehre and—

Q Was Fred Hicks there?

[296] A Fred Hicks.

Q That's ten.

A There's one more missing.

Q Arthur O'Hara?

A Yes.

Q What happened at that meeting?

A At that meeting there was—

TRIAL EXAMINER: Excuse me, before you answer the question.

Were you the only union representative present?

THE WITNESS: I was.

TRIAL EXAMINER: Go ahead.

Q (By Mr. Green) Describe what happened at that meeting.

A At that meeting the guys told me what their gripes were and that they needed a union, and I told them the only way they could possibly get a union is with union cards, which I put on the table and they signed.

They passed them from one to the other and signed them.

Q Did you—

MR. ROSENTHAL: Objection. The question, I know, is going to be leading. Before you get it out of you month, I am going to object before the damage is done.

Ask him what happened, not did something happen.

Q Describe what happened.

[297] A We told—all of the men signed cards. I got eleven cards back, picked the cards up off the table, I put them in my briefcase.

They then told me that attempts before, seven or eight years before, to get a union in, and they didn't want the same thing to happen again—

MR. ROSENTHAL: Objection as to what they told him happened seven or eight years before.

TRIAL EXAMINER: I am not accepting it as the truth of the matter, but I accept it simply as what transpired at this meeting, this organizational meeting.

I will allow it to stand.

THE WITNESS: And that—

TRIAL EXAMINER: I might add that it would also be indicative of the intent of the parties in signing the cards and also signing the document that was signed at that meeting.

Go ahead.

THE WITNESS: They told me that there had been a prior attempt to organize the plant seven or eight years ago and that there had been raises given out which destroyed the majority, and they didn't want this to happen again.

TRIAL EXAMINER: Mr. Examiner, I move that this be stricken. He is using "they." I don't know whether it is an editorial "they" or real "they."

[298] TRIAL EXAMINER: You have an objection on the grounds that he is not identifying the person?

MR. ROSENTHAL: Correct, and I object on the grounds that this is purely hearsay to begin with, we have no substantiation for this, and I think to permit this to get into the record is highly prejudicial to the interests of my client, and I move that all reference to this be stricken and physically expunged from the record.

TRIAL EXAMINER: I think your objection is well taken with regards to the identification of the speakers at the meeting, but it sems to me that this is material to indicate that the employees had a motive and purpose and did perhaps sign the cards, and the exhibit which indicated they were willing to go on strike if they weren't recognized at their own free will.

Q (By Mr. Green) Mr. Hissam, who if anyone, told you about this?

TRIAL EXAMINER: When you refer to the remarks of any individuals that was made at the meeting, would you identify the individuals?

THE WITNESS: Yes.

Dominick Caliciotti told me that he was there at the time.

Now, I don't know if Charley Shaw was or not, I think he was, though, and they talked it over, what happened [299] before, and—should I go on from that point of view?

TRIAL EXAMINER: Tell us. Answer the question. The question was what transpired at the meeting. Could you tell us what transpired, what was said, who said it, what the various people who were present did, if you saw them do it.

THE WITNESS: So, I told them, I said, "There's two ways that we could do it, we could take an election, which would take a little time," and they said they didn't want the time.

When I say "they" I mean everybody.

MR. ROSENTHAL: Move that it be stricken.

TRIAL EXAMINER: Can you identify any one who said that?

THE WITNESS: Any one that said it?

TRIAL EXAMINER: They didn't want an election?

THE WITNESS: I know Shaw was in that group, there was Dominick, there was Munoz, I think Jack Munoz and a few of the others. I don't know who the rest of them were, but they were all talking in general that they did not want this to happen, and I told them, I said, "Well, the only other way you can do it is if the cards represent the majority, let me go and ask for recognition."

If they didn't get recognition and "you don't want this to happen again, the only thing is to go out on strike if you want the union as the bargaining agent." [300] They said they would do this.

As a matter of fact, I took a hand-raise vote on it and it was unanimous. I said I would like to have it in writing, at which time Joe Munoz wrote the stipulation out, and it was passed around the room and the fellows signed it.

Q I show you General Counsel's Exhibit 5. Is this the stipulation you refer to?

A Yes, that is the stipulation.

Q Go ahead.

You said before that the men at that meeting signed cards. I show you General Counsel's Exhibit 4-L. You observe—

MR. ROSENTHAL: Objection, the question is again going to be leading. Ask him what it is.

TRIAL EXAMINER: You have a card in your hand. What is it?

THE WITNESS: This is a union membership card signed by Michael Malloy, which I saw Mike sign this card myself.

As a matter of fact, Mike was to my right. I was standing up in position to see him sign this card.

Q (By Mr. Green) What is this on the bottom left-hand corner?

A On the bottom I initialed where I saw him sign the card.

[301] Q What date?

A It was done on October 11th.
Q Very well.
I show you General Counsel's Exhibit 4-M.
A This is Arthur O'Hara, this is also a membership card and this was also signed in my presence and my initials are on it.
Q I show you General Counsel's Exhibit 4-N, ask you to identify it.
A This is Joseph Muniz. This is also a membership card signed by him and signed on the same night at my home, in my presence.
Q What is this on the left-hand corner?
TRIAL EXAMINER: You say in your presence. When you say that do you mean you saw him signing it?
THE WITNESS: I was standing and the rest of them were sitting. I could see all of them sign their cards.
As a matter of fact, Mike Malloy was standing—sitting as close as him and I are at the table. I was standing at the corner of the table and he was sitting on the end of the table.
Q (By Mr. Green) By the way, where were all these people in your house?
A In my dining room.
Q How big—would you describe your dining room?
A My dining room is approximately eleven by thirteen.
Q Feet?
[302] A Feet.
Q Where were they sitting?
A They were sitting around my diningroom table.
Q Chairs?
A I have chairs around my diningroom table.
Q Where were you?
A I was standing by the buffet on the corner of the table—at the corner of the table.
Q I show you General Counsel's Exhibit 4-B, ask you to identify it.
A This is James Ehre, it's also membership card to which—Jim was sitting a little bit back from the

table, in which he leaned up on the table and signed the card.
Q What is this on the left-hand corner?
A Also my initials in the left-hand corner.
TRIAL EXAMINER: Did you see him sign the card?
THE WITNESS: Yes, I was sitting—I got a table six feet long and about three and a half feet wide, and Jim leaned up on the table and signed the card.
Q (By Mr. Green) I shown you General Counsel's Exhibit 4-C, ask you to identify it.
A This is a card signed by Fred Hicks. It's a membership card signed by Fred Hicks on the same night, October 11th at my home. It's also got my initials on to it.
Q Did you see—
[303] Yes, I saw Fred Hicks sign that card.
Q I show you General Counsel's Exhibit 4 for Identification, ask you to identify it.
A This is James Stempert's membership card which he signed at my house which I saw him sign. This was during which the cards were going around the table.
Q What is that in the left-hand corner?
A My initials were also in the left-hand corner where I saw him sign it.
Q I show you General Counsel's Exhibit 4-E, ask you to identify it.
A This is Harold Vandermark's card, signed it at the same time, he was on the opposite—he was two seats down when he signed the card. My initials are also on that card.
TRIAL EXAMINER: Did you see the card signed?
THE WITNESS: I saw the card signed.
Q (By Mr. Green) I show you General Counsel's Exhibit 4-H and asked you to identify it.
A This is Herman B. Masker's card. It was signed the same night at my house with this membership card, and I also saw Herman sign that card.
Q What is on the bottom?
A On the bottom left-hand corner I initialed.

MR. GREEN: I am going to offer these cards into evidence as General Counsel's Exhibits 4-L, 4-M, 4-N, 4-B, [304] 4-C, 4-D, 4-E and 4-H.

TRIAL EXAMINER: Have you interrogated him with respect to 4-F and 4-J?

MR. GREEN: I think those are already in.

TRIAL EXAMINER: Well, I would suggest you interrogate him about those. We have him on the stand, so we do not have to call him back when he leaves if you have problems about the admissibility of those cards.

I want to avoid the possibility of needing to grant a continuance later on in the event these cards are not deemed admissible, at least we will have the evidence of a witness on the subject, so will you interrogate him as to those cards?

Q (By Mr. Green) I show you General Counsel's 4-J and ask you to identify it.

A This is a card signed by Charles Shaw, a membership card and also got my initials in the corner, and I also saw Charles Shaw sign this card.

Q I show you General Counsel's Exhibit 4-F, ask you to identify it.

A This is Dominick Caliciotti's membership card, my initials are on this card. I also saw Dominick Caliciotti sign this card.

TRIAL EXAMINER: May I have copies of the exhibits you are now offering?

[305] MR. ROSENTHAL: And the originals, Mr. Green?

MR. GREEN: Oh, these two.

TRIAL EXAMINER: May I have the copies of the cards, please?

I would like to have the ones with the exhibit numbers, if I may.

MR. ROSENTHAL: You want the originals also, sir?

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

Q (By Mr. Green) I show you this card and ask you to identify it, General Counsel's 4-A.

A This is Jack Munoz. My initials are on it and I saw him sign this card.

Q When?

A October the 11th.

Q You say all these cards were signed in your presence?

A In my presence and in front of me.

Q On what date were they signed?

A All signed on October 11th in the evening.

Q Where?

A 707 Pennsylvania Avenue in my diningroom.

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[311] Q (By Mr. Green) Why don't you go on with the events that happened at that meeting?

A After the cards were signed I stated before that there [312] was talk about a union trying to get in before—

MR. ROSENTHAL: Mr. Examiner, now I object to any conversation between Mr. Hissam and the employees as irrelevant and immaterial, and the fact that the General Counsel is giving this witness free rein to testify at will does not affect the immateriality or the irrelevancies of the statement.

TRIAL EXAMINER: I will overrule your objection.

MR. GREEN: I withdraw the question.

Q (By Mr. Green) Why don't you describe what happened on the following day.

A On the following morning I went to the plant about seven-thirty, at which time I met Mr. Cohen there at the plant a little later, he came in a bit after I did, and we talked to a couple of the employees, seven-thirty, to tell them we was there and calling that morning.

MR. ROSENTHAL: I move that the witness' remark be stricken unless he identifies the employees.

MR. COHEN: I am going to have to testify about the same thing. May I be excused?

TRIAL EXAMINER: If you so desire, you may be excused. Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

I will grant the motion unless the parties are identified.

[313] Go ahead.

THE WITNESS: One of the parties that I talked to that morning was Jack Munoz and Harold Vandermark.

Q (By Mr. Green) Go ahead, you know.

A And we asked them what time the Derses come in. They said Walter comes in at about a quarter to nine, as a rule.

We went back at a quarter to nine, and Walter Derse walked into the vestibule, or whatever you call it up there. We asked the girl if Walter Derse was in or Mr. Arthur Derse was in, and neither one was in, and we waited there five or ten minutes.

Then we decided to go out for awhile.

We went out and we came back around, oh, approximately nine-thirty, and we went in again and asked for either Arthur Derse, Senior, or Walter Derse, and at this time they weren't in yet, so we sat in the car, a light color car, a guy walked out on the side of—in the meantime the girl told us that she expected Walter Derse in any moment, so we waited a couple of minutes, walked inside and asked if Walter Derse was in.

They said, "Yes, he just came in."

Q What time was this?

A About twenty minutes to ten, give or take.

Q Go on.

A And Walter Derse came to the vestibule, room there, [314] opened the door and Mr. Cohen introduced us to him, both of us to Mr. Derse, and told Mr. Derse we would like to see him in the office, and Mr. Derse took us from there into the office, and when we got to the office we told Mr. Derse we represented a majority of the people—

MR. ROSENTHAL: Objection.

THE WITNESS: —of his production and maintenance employees.

MR. ROSENTHAL: Objection.

Again I have no question to object to, but the witness is testifying with the word "we." Did both of you talk in unison, harmony, or who?

TRIAL EXAMINER: Mr. Hissam, will you state who made the statements, what the statements were?

THE WITNESS: Mr. Cohen did most of the talking.

TRIAL EXAMINER: Did you say anything?

THE WITNESS: Yes, I—later on in the conversation, yes.

TRIAL EXAMINER: All right, go ahead. Tell us what happened.

THE WITNESS: Mr. Cohen—

Q (By Mr. Green) Tell us what Mr. Cohen said.

A Mr. Cohen told Mr. Derse that—well, first off he asked him—told him we represented a majority of the production and maintenance employees, and asked him if it was [315] possible for a committee to come in because we had a committee designated to come in to see him.

He denied the committee.

TRIAL EXAMINER: What did he say?

THE WITNESS: He said that he wouldn't call anybody out of the production office into his office, out of the production plant.

So he walked out of the office.

Just as we walked in the door Mr. Cohen put the cards on the table, the thirteen—put the eleven membership cards that were signed and there was two more cards with it, which I gave him before, and Mr. Derse picked these cards up and started going through these cards, and—

Q (By Mr. Green) Mr. Derse picked these cards up?

A Yes, he picked these cards up, started going through them one by one.

Meantime Mr. Cohen was talking to him about the relationship that we have with the other plants and the town, good relations was between the other plants, and when Mr. Derse come down approximately half way through the cards, he lay one card off to his left and he went on down through the cards looking at them and laid another one off, the last one off.

Finally he asked Mr. Cohen, "What are these two cards?"

Mr. Cohen said, "We anticipate two more people to sign [316] cards."

Q Did you see what those cards were?

A Those cards were blanks.

Mr. Derse then said that he would not—this was too big a decision for him to make by himself. He said he would have to talk to the rest of the family because it was a family deal and that his one brother was in Atlantic City and it was impossible to get ahold of him, so Mr. Cohen said—asked him what time he was coming back. He said, "I don't know, he might be back any day, he might be back in two days, I don't know when he'll be back."

Mr. Cohen said, "Is there any possibility of getting in touch with him today?"

He said, "There's no possibility of getting in touch with him today. It's not important enough to bring him back from Atlantic City."

This conversation carried on between Mr. Derse.

In the meantime while we were talking with Mr. Derse, he was going through the cards in a fan-like fashion looking through them again and this took approximately about a half hour, give or take a few minutes, so before he left I asked if I could see Jack Munoz, and Mr. Derse said he would not call Jack Munoz into the office.

We asked—I didn't ask him, Mr. Cohen asked him then [317] if it was possible to get Jack Munoz on the intercom, the plant's phone.

He said he would not get Mr. Munoz on the plant's phone.

Mr. Cohen asked him if we called on the outside could Mr. Munoz answer the phone?

He said "you go and then we'll see."

So, by that Mr. Cohen and I went out to the car, got in the car—

Q About what time was that?

TRIAL EXAMINER: Mr. Hissman, before you leave this particular conversation, could you tell me

what either you or Mr. Cohen said when you first saw Mr. Derse on this occasion? What was said to him by you?

THE WITNESS: After we introduced ourselves, got into the office?

TRIAL EXAMINER: Yes.

THE WITNESS: The first thing, before we actually got into the office, Mr. Derse and Mr. Cohen were talking on the way in, and just as we got to the door, Mr. Cohen told Mr. Derse that we held a majority of the production and maintenance employees, had the majority signed up and would like to be the bargaining agents for the production and maintenance employees.

TRIAL EXAMINER: Very well. What was Mr. Derse's [318] answer to that, if anything?

THE WITNESS: He didn't give an answer. We walked in and sat down. Mr. Cohen put the cards on the table. Mr. Derse picked them up and looked at them.

The only time he gave us an answer was that it was too big of a problem for him to decide, he was only one of the corporation, he had to talk to the rest of the family before he could make any decisions.

TRIAL EXAMINER: Very well.

Q (By Mr. Green) Are these cards you speak about the cards identified as General Counsel's Exhibit 4?

A Yes.

Q The ones that were signed—

A The ones that were signed the preceding night.

Q Were there any other cards in there?

A There was two other blanks.

TRIAL EXAMINER: How many cards did you have in your possession that you laid on the desk?

THE WITNESS: Laid eleven cards and two blank cards, thirteen cards altogther total.

Q Who had them?

A Mr. Cohen had them when we walked in.

Q All right.

About—after you asked to see Jack Munoz, what happened?

[319] A Well, we left the plant.

Q About what time is this?
A Approximately a quarter after ten.
Q During this—
A Thereabouts.
Q A quarter after ten?
A We went from there up to the phone booths where I called—Mr. Cohen called my Regional Director to talk to him. Then I made a phone call back to the plant to Jack Munoz.

And I told Jack the company was giving us a stall, that they didn't think that the boys would all go. But before this, starting this call back to the plant, a girl answered the phone and said to me, "Is this an emergency?"

I said, "I think so." And meantime I could hear one click on the line, and Jack picked the phone up on the other side, I said, "Jack, someone is listening."

With that the phone went back down again.

Q What did you hear?
A Like the clicks of a phone, someone is possibly listening. The minute I mentioned it to him, they hung back down again.

I told Jack then that they wouldn't sit down with us—

MR. ROSENTHAL: I am going to object to whatever his [320] conversation was with Mr. Munoz.

TRIAL EXAMINER: In view of the fact that there is some question as to whether the employees joined the picket line of their own free will, I think I will allow this conversation, but only for that purpose.

THE WITNESS: So I told Jack that the boss—that they wouldn't sit down with us and give us a definite date, and he might as well walk.

By that I hung the phone up and took Mr. Cohen's car back to the plant.

He still stayed there, he had another call to make.

When I got back to the plant the people were already out the door and coming out to the highway and asked me what to do.

I told them, "Take your cars out of the parking lot."

They took their cars out of the parking lot and we started picketing immediately.

We always have strike signs made up, say "On Strike," got a blank, says, "Textile Workers Union of America," blank after the Local.

Q Who was picketing?
A The eleven men that came out of the plant.
Q All right, go ahead.
A I was out there, oh, about two or three minutes picketing when a truckman come by and I turned around and went [321] the other way.

About fifteen minutes after we was out there one of the fellows on the picket line told me, "There goes Pop Derse."

Q Excuse me, did you stay on the picket line the whole day?
A Yes, I did.
Q During the time that you were on the picket line, did you happen to see any of the Derses that day?
A Yes, I saw all of them go by that day.
Q Did you know all the Derses at the time?
A I did not know the Derses at the time, they were pointed out by the pickets.
Q What about Walter Derse?
A Walter Derse, I saw him inside. I knew Walter Derse.
Q What time did you see Arthur Derse, Jr.?
A Arthur Derse, Jr., I seen between five-thirty and six-thirty, some place in there he come back to the plant, he backed up to the front door, took some kind of brown satchel, I don't know if briefcase or suitcase, out into the plant. He stayed roughly, I'd say, fifteen, twenty minutes and went out again.

TRIAL EXAMINER: When you were in the meeting with Walter Derse, is that who you were with?

THE WITNESS: Mr. Walter Derse.

[322] TRIAL EXAMINER: Did he indicate which one was in Atlantic City?

THE WITNESS: He said Arthur Derse, his brother.

TRIAL EXAMINER: Arthur Derse, Senior?

THE WITNESS: Junior.

TRIAL EXAMINER: Go ahead.

THE WITNESS: Then again that evening, sometime around eight o'clock, roughly, back came all four of the Derses in their own cars, the- came separately staggered in, and they were there until ten-thirty.

There was no lights on in the plant, just the office. I don't know what was going on, haven't the slightest idea.

Q (By Mr. Green) Did you—go ahead.

A We broke the picket line that night approximately, oh, about eleven, eleven-fifteen.

Q Did you—

TRIAL EXAMINER: Do you recall what street the pickets were on?

THE WITNESS: The pickets were on Mechanic Street, which actually where they were the parking lot is actually a continuance of Erie Street, and they were walking in front of the parking lot, so it was actually on the corner of Erie and Mechanic Street, if you want to look at it right.

[323] TRIAL EXAMINER: Were they picketing at the point where the production and maintenance employees entered the plant?

THE WITNESS: Yes.

TRIAL EXAMINER: While you were at the plant, did you observe that the employees who worked in the office area used a different entrance?

THE WITNESS: They used a different entrance, they used the front entrance. The fellows in the plant used the side entrance which faced Old Erie Street, the parking lot.

TRIAL EXAMINER: Which entrance did you observe the Derses using?

THE WITNESS: They used the front entrance.

TRIAL EXAMINER: Very well.

Q (By Mr. Green) About how far is that from the other entrance?

A Oh, I'd say roughly from the telephone pole going to the telephone pole, twenty-five—between twenty-five and thirty-five feet. I am not a judge of that distance.

TRIAL EXAMINER: Is it a fact that employees who would be going into the office entrance would have been required to go through the picket line to get into the building?

THE WITNESS: No, they would not be required to go through the picket line.

Q Did you picket any day thereafter?

[324] A I was on the picket lines generally for at least three and a half to four months every day.

Q Did you ever have occasion to meet with Walter Derse again?

A Yes, the day Mr. Rubenstein came up from New York. I was at the picket line and Mr. Derse—as a matter of fact, he come in and asked me if any of the Derses were in. I said no, they were all out to lunch. Mr. Sy Cohen was also there.

I said about ten minutes after Mr. Rubenstein came, who is my boss, Mr. Derse, Walter Derse, came in.

The three of us walked over to Mr. Derse—

Q Where?

A In the parking lot. At that time—as a matter of fact, the first—

Q Why don't you describe what happened that day?

A Okay.

Walter Derse pulled in through the picket line, and we walked up to him, and Mr. Rubenstein told Mr. Derse we would like to—introduced himself first as the Regional Director of New York State, gave his name to him and told him, he said, he asked if he could sit down—if Mr. Derse was ready to sit down and settle the situation.

Mr. Derse said, "I have no comment to make. If you want to know nothing." He said, "Contact my lawyers."

[325] He reached in his pocket, pulled out a piece of white paper, gave it to Mr. Rubenstein with his lawyer's name on it, and that was about the size of the conversation, because Mr. Derse walked away.

MR. GREEN: I have no further questions at this time.

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[402] HARMON MASKER

a witness called by and on behalf of the General Counsel, being duly sworn, testified as follows:

TRIAL EXAMINER: Be seated and give us your full name.

THE WITNESS: Harmon B. Masker.

TRIAL EXAMINER: Would you give us your address please.

THE WITNESS: Heatear's Hill, Matamoras, Pennsylvania.

TRIAL EXAMINER: Mr. Masker, you understand you are under oath?

THE WITNESS: Yes.

DIRECT EXAMINATION

Q (By Mr. Green) As of October 12, 1965 by whom were you employed?

A Wilder's Manufacturing.

Q Speak up.

A Wilder Manufacturing.

Q In what capacity were you employed by that company?

[403] A I was electric welder in heliarchy.

Q Mr. Masker, did you sign a card for the—Mr. Masker, how long had you been employed by Wilder Manufacturing Company?

A Approximately four and a half years.

Q Mr. Masker, did you sign a card for the Textile Workers Union of America?

A I did.

Q I show you General Counsel's Exhibit 4H and ask you if this is your signature.

A Yes, sir, it is.

Q On what date did you sign this card?

A I signed it on October 11th.

Q Mr. Masker, you stated you signed this on October 11th.

A Yes, sir.

Q Where did you sign this?

A At William Hissam's house.

Q About what time was that?

A It was approximately 7:00, 7:30.

Q Who else was present at Mr. Hissam's house?

A There was eleven of us plus Bill Hissam.

Q Would you please give us their names.

A There was Art O'Hara, Dominick Caliciotti, James Stempert, Jim Ehre, Jack Munoz, Joe Munoz, Charley Shaw, Mike Malloy.

[404] Q Was Fred Hicks there?

A Yes, Fred Hicks and myself.

Q Jim Stempert?

A Yes.

Q Harold Vandermark?

A Yes.

Q I want you to describe what happened at that meeting.

A Well, we all sat down at the table. There were some on the bench—

TRIAL EXAMINER: Is his testimony going to differ from that of the prior witnesses?

MR. GREEN: Well, I would like to develop what happened at this meeting with great detail. I think it is necessary.

TRIAL EXAMINER: All right, go ahead.

A We was all sitting around the table. Bill Hissam was standing at the far end, and we were talking about the conditions of the factory. One, we discussed about a petition we took up to have a fan installed and the other—

MR. ROSENTHAL: I object, this is irrelevant and immaterial, he is not identifying any speakers, and I think that conversations between these people are of no probative value in this proceeding.

MR. GREEN: Mr. Trial Examiner, I would like to develop what happened at that meeting. One, it is preliminary and [405] it is relevant to the issues.

TRIAL EXAMINER: Mr. Masker, would you, as near as you can remember, when you testify state the individuals who made the statements to which you are testifying.

I will overrule the objection. You may state what transpired at the meeting.

A Well, everybody was talking at one time. We was discussing this petition we took up to have a fan installed in the other welding shop. Now, to my knowledge everybody signed that petition and it was turned in to the office, and we never heard a thing about it after.

Then we talked about another statement or petition that we took up that—about starting to work at 7:00 o'clock in the morning. Well, that one went through, they left us work one year at 7:00 o'clock in the morning, but the following year before we could get another petition a notice come on the bulletin board that we would stay at our regular hour, and then we talked about the merit system, if you're out sick or late they took so many points or so many minutes or hours off of your vacation time, your first week of vacation, and that time the cards were passed, they were handed out and we signed the cards.

Now, I was sitting on the bench and I was waiting for a pencil or pen, which I signed it in pencil, looking at the card, to sign my card, and Jim Ehre and James Stempert [406] were sitting on the bench with me. Now, who was next to me I don't recall or which one signed first, but I saw either one of them sign first and then I took the pencil and signed mine, and I witnessed or saw the other guy sign his or was writing on the card and then we handed them back.

Q Mr. Masker, I show you General Counsel Exhibit 4-B and ask—I show you General Counsel Exhibit 4-B in evidence and ask you if this is the card you saw James Ehre sign?

A Yes, it is.

Q I show you General Counsel Exhibit 4-D in evidence and ask you if this is the card that James Stempert signed.

A Yes.

Q After the cards were signed—

A After the cards were signed—

TRIAL EXAMINER: Did you see anyone sign a card besides the two individuals to whom General Counsel just referred?

THE WITNESS: I don't remember seeing anybody else actually sign the cards.

A We discussed about the strike. Dominick started talking about once before they tried to organize this factory and before they could get ready to go on strike had a couple of meetings and the majority was broke down, so we voted on immediate action, a strike, and we had a paper wrote up by Joe Munoz and everybody signed that paper to the effect of strike.

[407] Q Mr. Masker, I show you General Counsel Exhibit 5 and ask you if this is the paper you are referring to.

A Yes, it is.

Q Is this your signature?

A Yes, sir, it is.

Q Was everybody sitting down at the time this was signed?

A This paper here?

Q Yes.

A Yes, all except Bill Hissam. He stood all the while.

Q Was everybody sitting down when the cards were signed?

A Yes.

Q As far as you recall.

A Yes, that I recall.

Q All right.

Now, at the time the cards were—at the time you signed your card do you recall if Mr. Hissam was sitting down?

A No, Mr. Hissam wasn't.

Q What was he doing?

A He was standing at the far end of the table.

TRIAL EXAMINER: Would you hand the witness his card, please.

You note down the left-hand corner there is something written.

THE WITNESS: Yes.

[408] TRIAL EXAMINER: What is that?

THE WITNESS: WLH.

TRIAL EXAMINER: Do you know what that stands for on your card?

THE WITNESS: William Hissam. I don't know what the "L" stands for, sir.

TRIAL EXAMINER: Did you see that put on the card?

THE WITNESS: At the time I signed it, no, sir.

TRIAL EXAMINER: Very well.

Who did you hand your card to?

THE WITNESS: I don't remember, sir, if I passed it up or it was handed direct to Bill Hissam.

Q Mr. Masker, did you picket the following day?

A Yes, sir, I did.

Q Could you describe—would you describe what happened immediately—well, strike that.

Did you go to work on the morning of October 12, 1965?

A Yes, sir, I did.

Q Could you tell us what happened at about 10:00 o'clock.

A Well, at approximately 10:00 o'clock we was waiting for either the phone call or for a committee that went and see Mr. Walter Derse, and approximately 10:15 or 10:30, somewheres in there, Jack Munoz received a call in a production stand office, and he come out and said, "It's time to go out on strike, they won't talk."

[409] Q Yes.

A So we got our stuff, we punched out and went out into the parking lot and took our cars out in the street and we come back and right away we formed our picket line.

Q Where?

A In the driveway of the factory.

Q Did you have a sign?

A Yes, sir, I did have a sign.

Q Did you picket that entire day?

A Yes, sir, I was there all day up until about 5:30, 6:00 o'clock when I went home to eat, and I was home for approximately 45 minutes and I come back.

Q At any time during that day did you see Arthur Derse Jr.?

A Yes, I did, before I went home to eat.

Q What did you see?

A He drove past the picket line to the front of the factory.

Q Yes.

A And he got out and went into the factory.

Q Did he have anything with him?

A I don't know if it was a suitcase or briefcase, it was a big bag, could be either one.

TRIAL EXAMINER: Do you recall what was on the picket sign?

[410] THE WITNESS: On the picket sign we had "On Strike, Wilder Manufacturing, 1410."

Q Mr. Masker, after you went out on strike did you have occasion to see—during that first day did you have occasion to see any of the other Derses?

A Yes, I did.

Q Who?

A I saw Bob or Robert and Mr. Derse, Sr.

Q About what time was that?

A It was in the afternoon.

Q Any other time that you recall?

A During that day?

Q During that day.

A I don't recall if I see them at that one time, I may have seen him before.

Q Did you see him at any time that evening?

A Yes, after I came back from supper they all came back to the plant and in.

Q What did you observe, how did it look like?

A The front part was all lit up.

Q How about the factory part?

A No.

Q No lights?

A Might have been the flood light.

Q Is that flood light outside or inside the factory?

[411] A One inside and a big one outside.
Q On October 13th, the following day, did you go to the situs of the factory?
A Did I go inside?
Q Not inside, did you picket?
A Yes, I did.
Q For how long after that did you picket?
A The day after the strike?
Q For how long thereafter?
A Well, I picketed every day, approximately every day.
Q For how long?
A Three, four hours.
Q A week, two weeks? How long?
A Well, every week. I've been there every week at least four hours every day of the time we've been out.
Q Up until when? Every week up until when?
A Until about three weeks ago, four weeks when I left.
Q In the second day did all the eleven picket together at sometime during that day?
A Yes, we did.
Q About what time was that?
A Well, in the morning approximately everyone was there, only one I'm not sure of, and that's Jim Stempert, but the rest was all there on the second day in the morning.
[412] TRIAL EXAMINER: Did anybody join the picket line other than the eleven who first were on the picket line?
THE WITNESS: Yes, sir, one did, Helmut. I believe that's how you pronounce it.
Q Helmut who, do you know?
A I just know him by Helmut. That's how I call him, a German fellow.
Q Is that Helmut Hernsdorf?
A Yes.

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[443] JOSEPH MUNOZ

a witness called by and on behalf of the General Counsel, being duly sworn, testified as follows:

TRIAL EXAMINER: State your name, please.
THE WITNESS: Joseph Munoz.
TRIAL EXAMINER: And your address?
THE WITNESS: Neversink Drive, R.D. #2, Port Jervis, New York.

[444] DIRECT EXAMINATION

Q (By Mr. Green) Mr. Munoz, as of October 12, 1965 by whom were you employed?
A By Wilder Company.
Q Speak up.
A By the Wilder Company.
Q In what capacity were you employed?
A I was assembling and soldering.
Q For how long had you been employed at that company?
A Approximately six years.
TRIAL EXAMINER: Are you presently working there?
THE WITNESS: No.
Q Mr. Munoz, did you sign a card for the Textile Workers Union of America?
A Yes.
Q I show you General Counsel Exhibit 4N. I ask you if that is your signature.
A Yes.
Q Speak up, please.
A Yes.
Q Is this the date that you signed it?
A October 11th, yes.
Q Did you read this card before you signed it?
A Yes.
Q Mr. Munoz, did you go out on strike on October 12,
[445] 1965?
A Yes, I did.
Q How long thereafter did you picket?
A About five months.

Q On October 11th—strike that.
On October 12, 1965, the first day of the strike, did did you have occasion to see Arthur Derse, Jr.?
A That night.
Q That night?
A Yes.
Q About what time was that?
A Between maybe 5:00 and 7:00.
Q Between 5:00 and 7:0?
A Yes.
Q What did you see, what did you observe?
A Mr. Derse drove up in a car in front of the building, backed up, he opened the trunk, took out a briefcase or valise, opened the building, went inside, turned on the lights.
MR. GREEN: No further questions.
TRIAL EXAMINER: Did you see all the four Derses on that day?
THE WITNESS: Yes.

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[453] HAROLD VANDERMARK

a witness called by and on behalf of the General Counsel, being duly sworn, testified as follows:

TRIAL EXAMINER: State your name.
THE WITNESS: Harold David Vandermark.
TRIAL EXAMINER: And your address?
THE WITNESS: Post Office box 718, Port Jervis, New [454] York.

DIRECT EXAMINATION

Q (By Mr. Green) Mr. Vandermark, as of October 12, 1965 by whom were you employed?
A Wilder Manufacturing.
Q In what capacity were you employed with that company?
A Machine operator.
Q For how long had you worked at that company?
A Since July of 1962.
TRIAL EXAMINER: Are you still working for the company?

THE WITNESS: I am not back.
Q Mr. Vandermark, did you sign a card for the Textile Workers Union of America?
A Yes, I did.
Q I show you General Counsel Exhibit 4-E and ask you if this is your signature.
A Yes, it is.
Q On what date did you sign that card?
A October the 11th.
Q Mr. Vandermark, I show you General Counsel Exhibit 5. Did you sign this General Counsel Exhibit 5?
A Yes, I did.
Q Did you go out on strike on October 12, 1965?
A Yes, I went out.
[455] Q How long after that did you remain out?
A Until April, 1966.
Q Did you picket?
A Yes, I did.
Q For how long did you picket?
A Just about every day.
Q Did you see any of the Derses while you were on the picket line the first day?
A Yes.
Q Who was it?
A Mr. Arthur Derse, Sr.
Q Recall anybody else?
A Mr. Walter Derse, Bob, Robert Derse and later that night Artie came in.
A Artie who? What is the name?
A Arthur Derse, Jr.
Q Jr.?
A Yes.

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[481] ARTHUR O'HARA

a witness called by and on behalf of the General Counsel, being duly sworn, testified as follows:

TRIAL EXAMINER: Would you be seated and give us your full name.
THE WITNESS: Arthur J. O'Hara.
TRIAL EXAMINER: Your address?

[482] THE WITNESS: 14 Francis Street, Port Jervis, New York.

DIRECT EXAMINATION

Q (By Mr. Green) Mr. O'Hara, as of October 12th by whom were you employed?
A Wilder Manufacturing.
Q In what capacity were you employed by that company?
A Work in the packing department, packing crate.
Q For how long had you been employed by Wilder Manufacturing Company?
A Approximtaely three months.
TRIAL EXAMINER: Are you presently working for Wilder?
MRS. MORIO: Excuse me, could I have that last question and answer?
TRIAL EXAMINER: He said "Approximately three months."
Q Is that how long you had been working?
A For Wilder?
Q Yes.
MRS. MORIO: Before October 12th.
A Yes.
TRIAL EXAMINER: Are you presently working for Wilder?
THE WITNESS: No.
Q Mr. O'Hara, did you ever sign a card for the Textile Workers Union of America?
A I did.
[483] Q I show you General Counsel's Exhibit 4M, ask you if that is your signature.
A It is.
Q On what date did you sign that card?
A October 11th.
Q Where did you sign this card?
A Mr. Hissam's residence.
Q Mr. O'Hara, I show you General Counsel's Exhibit 5 and ask you if this is your signature.
A It is.

Q On what date did you sign this?
A Is that the—
Q Why don't you read it to yourself.
A All right.
That was the same night, October 11th.
MR. GREEN: Mr. Trial Examiner, I do not want to ask this witness about the entire meeting on October 11th. The question I may ask may be leading, but I would like to cover one particular point.
TRIAL EXAMINER: As long as a leading question is only preliminary I will permit it.
Q Mr. O'Hara, do you recall an election for a committee?
A Yes.
Q Do you know how that came about?
A Yes, during our discussion in the course of the even- [484] ing there we said that if Wilder Manufacturing were willing to sit down with the Union, with the representatives of the Union, that we would send a committee in with them to be present when they were in there.
Q Mr. O'Hara, did you picket the following day?
A Yes.
Q For how long that day did you picket?
A Believe it or not, I was there right until about 11:00 o'clock that night.
Q Did you see Arthur Derse, Jr. that day?
A Yes, I did.
Q Will you describe the circumstances when you saw him.
A Well, he drove in in his car, it was sometime after the employees had left the factory. I would say it was, oh, approximately maybe 5:30 to 6:30, a quarter to 7:00 maybe.
Q Yes.
A And he got—he drove up to the front entrance of the factory—that's beyond where we were picketing—and got out of his car, took a, I don't know, briefcase out of the car and went in the factory.
Q How long after this first day did you picket?

A Now, may I ask this question. Period of months or each day how long did I picket?
Q No, period of months.
[485] A Let me see, I was on there until March sometime, I believe it was, because I got another job at that time.
MR. GREEN: We have no further questions at this time.
TRIAL EXAMINER: Mr. Cohen?
MR. COHEN: No questions.
TRIAL EXAMINER: Mr. Rosenthal?

CROSS-EXAMINATION

Q (By Mr. Rosenthal) Mr. O'Hara, when you were picketing sometime around the beginning of November do you recall an incident that the police investigated concerning nails and tacks being thrown on the company driveway?
MR. GREEN: I object, outside the scope of the direct.
TRIAL EXAMINER: Overruled.
A I remember the occasion.
Q Did you see the nails on the driveway yourself?
A No, I did not see them.
Q Were you there when the police came?
A I was.
Q Were you there when an incident about one of the cars in the parking lot was punctured and flattened?
MR. GREEN: I object, same grounds.
TRIAL EXAMINER: Overruled.
Q About the same time.
A Yes, shortly after that I remember them saying that there was tires punctured.

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[490] REDIRECT EXAMINATION

Q (By Mr. Green) Mr. O'Hara, did you ever have occasion to see any tires slashed?
A What?
Q Slashed tires.

A No, I didn't see them, no.
MR. GREEN: I have no further questions.

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[491] HELMUT HERNSDORF

a witness called by and on behalf of the General Counsel, being duly sworn, testified as follows:

TRIAL EXAMINER: Be seated, please.
Give your name.
THE WITNESS: Helmut Hernsdorf.
TRIAL EXAMINER: Your address?
THE WITNESS: 99 Mechanic Street, Port Jervis.

DIRECT EXAMINATION

Q (By Mr. Green) Mr. Hernsdorf, as of October 12, 1965 by whom were you employed? On October 12th by whom were you employed?
A Wilder Manufacturing .
TRIAL EXAMINER: Are you still employed there?
THE WITNESS: No.
TRIAL EXAMINER: Very well.
Q How long had you been employed by that company?
[492] A I started a new job April 7th.
Q No—
A Oh, two months.
Q Is that how long you—that is the total amount of time you worked before the strike?
A Yes.
Q Two months?
A Yes.
Q When?
A From August 9th to October 12th.
Q Mr. Hernsdorf, did you ever sign a card for the Textile Workers Union of America?
A Yes.
Q I show you General Counsel Exhibit 4-K—I believe this is for identification—and ask you if this is your signature.

A Yes.
Q Can you tell me the date that you signed this.
A 10/12/65.
Q Did you read this card before you signed it?
A Yes.
MR. GREEN: I offer this into evidence.
MR. ROSENTHAL: Could I see the card, please.
Q Under what circumstances did you sign this card, Mr. Hernsdorf? Where were you?
[493] A Because—
Q Not why, where were you? Where did you sign this card?
A Outside on the picket line.
MR. GREEN: I offer this card in as General Counsel's Exhibit 4-K in evidence.
MR. ROSENTHAL: I have no objection at this point. However, I reserve the right to object to its introduction following my cross-examination of this witness.
TRIAL EXAMINER: You want me to reserve ruling on the motion?
MR. ROSENTHAL: Yes, I have what would normally be voir-dire, but it goes beyond that.
TRIAL EXAMINER: Very well, I will reserve ruling on this until after your cross-examination.
Q Mr. Hernsdorf, did you ever have occasion to picket yourself? Mr. Hernsdorf, did you go on the picket line?
A Yes.
Q When? When was that?
A October 12th, afternoon.
Q Any other times?
A Next following day too.
Q When did you picket on the following day? Do you remember what time?
[494] A in the morning.
TRIAL EXAMINER: What date did you sign your card?
THE WITNESS: October 12th.
TRIAL EXAMINER: Was that the day the employees first put up the picket line?
THE WITNESS: Yes.

TRIAL EXAMINER: How long were you in the vicinity of the picket line on that day?
THE WITNESS: About three hours, something, a few hours.
TRIAL EXAMINER: What did you do?
THE WITNESS: Nothing, stay around.
TRIAL EXAMINER: Was there a group of pickets walking back and forth? What were the pickets doing? Were they moving, standing still?
THE WITNESS: This afternoon—
TRIAL EXAMINER: Do you understand my question?
THE WITNESS: Yes, yes, but this afternoon I can't remember. The next day, yes, was walking.
TRIAL EXAMINER: What?
THE WITNESS: Walking on the picket line.
TRIAL EXAMINER: Did you at any time walk with them?
THE WITNESS: Yes.
TRIAL EXAMINER: How long did you walk with them?
THE WITNESS: Few times.
[495] TRIAL EXAMINER: How long? An hour, ten minutes, two hours?
THE WITNESS: I would say "Yes."
TRIAL EXAMINER: How long?
THE WITNESS: A few days.
TRIAL EXAMINER: How long at any one time did you walk with them on any one day?
THE WITNESS: Oh, about an hour, about an hour.
TRIAL EXAMINER: Very well.
Go ahead, Mr. Green.
MR. GREEN: I have no further questions of this witness.

CROSS-EXAMINATION

Q (By Mr. Rosenthal) Mr. Hernsdorf, when did you first go over to the picket line, at what time on October 12th?
A Right after lunch time.
Q You continued to work until lunch; is that correct?

You did not stop work at 10:30 that day, did you?
A No.
Q You worked until lunch?
A Yes.
Q When you went out at lunch time did you speak to anybody?
A Yes.
Q To whom did you speak?
[496] A I know his first name, Dominick.
Q You spoke to a fellow named Dominick?
A Yes.
Q Did he talk to you about the Union or about the strike?
A Said to me, "You like to join us?"
Q Was this the first time that anybody had asked you to sign a card for the union?
MR. GREEN: You understand the question?
THE WITNESS: Yes, I understand the question.
MR. GREEN: Answer it.
Q Did anybody ask you to sign a union card the day before the strike on October 11th?
A Yes.
Q Who was that?
A I guess was Jack Munoz.
Q When did he speak to you?
A In the morning.
Q The morning of the 12th or the morning of the 11th? The morning of the strike or the day before?
A I can't remember that same day or day before, I can't remember.
Q Did you refuse to sign a card at that time?
A Yes.
Q What did Mr. Munoz say to you when you refused to sign [497] the card?
A Said nothing about—
Q Mr. Hernsdorf, let me explain to you now. You are now testifying in a proceeding run by the United States government. You do not have to be afraid to answer.
MRS. MORIO: There is no reason for counsel to make such a statement, the witness is doing his best

to answer the question. Counsel is attempting to intimidate the witness. He is doing the best answering the questions put to him.
TRIAL EXAMINER: Mr. Hernsdorf is having a little difficulty in understanding the questions put to him by counsel.
Mr. Hernsdorf, if you do not understand the question would you tell me—
THE WITNESS: Yes.
TRIAL EXAMINER: —and then I will see if I can have the lawyer clarify it so you can understand it. Very well?
THE WITNESS: Yes.
TRIAL EXAMINER: All right.
Q When Mr. Munoz asked you to sign a card and you refused, what, if anything else, did he say to you?
A He said to me, "You like to join the union, you like to sign a card?" That's all.
Q And you said, "No?"
[498] A Yes, sir.
Q You went out on the picket line and you spoke to Dominick?
A Yes.
Q Dominick asked you to sign a card. What did you say to him?
A He didn't ask me to sign a card, said to me, "You like to join us?"
Q What did you say at that point?
A I said, "Well, most of the guys out here, you know, so I'm with you."
Q When you signed a card what did you believe you were signing? Did you know what the card was for?
A To join the union.
Q You thought what when you signed the card, you were joining the union?
A Yes.
Q Did you ever resign from this union once before?
A Yes.
Q Was that right before you came to work for Wilder?
A Yes.

Q Now, Mr. Hernsdorf, I want you to try and tell us now what made you now decide to rejoin this union that you had previously resigned from. Why did you now change your mind and think that you had better join this union when you had [499] just recently resigned from it?

MRS. MORIO: Objection, the witness testified that most of the guys were out and he decided to join them.

TRIAL EXAMINER: I will object to going into the state of this individual's mind, which I understand is inadmissible.

Q Had you heard anyone say that if you did not sign a card the union would make things tough on you?

MRS. MORIO: Objection.

TRIAL EXAMINER: Overruled.

A Please read me the question.

Q Did you hear anybody say anything to the effect that if you did not sign this card that the union would make things rough on you?

A No.

Q Did they say they would make it rough on your wife?

A Nobody said to me.

Q Did you hear anybody say this?

MRS. MORIO: Objection.

MR. GREEN: Objection. Why don't we qualify the date and time. I don't think the witness understands what he's talking about.

MR. ROSENTHAL: If he did not understand me he did not understand you either.

MRS. MORIO: Objection, Mr. Trial Examiner.

[500] MR. ROSENTHAL: If he did not understand you he did not understand when they asked him to sign a card.

TRIAL EXAMINER: I think the objection is well taken as to time.

I will sustain the objection to the question.

Q Now, Mr. Hernsdorf, you say that you spent some time talking to Dominick on October 12th; is that correct?

A Yes.

Q How long did you stand there talking to him?

A A few minutes or a minute.

Q Were some of the people carrying picket signs?

A Yes.

Q Did you carry one?

A No.

Q Have you ever carried a picket sign?

A No.

Q After you talked to Dominick a few minutes what did you do?

A Just stood there.

Q You stood around and you watched them?

A Yes, that's all.

Q You just watched?

A Yes.

Q You did not walk up and down with a picket sign?

A Like I said before, this afternoon I can't remember [501] whether I walked or didn't.

Q On the afternoon of the strike you say that you stood around and watched them but did not carry a picket sign, is that right?

A Yes.

Q Then you went home?

A About 3:00 o'clock, something like that.

Q Did you come back the next day?

A Yes.

Q What time did you get to the plant the next day?

A In the morning, in the morning.

Q What time?

TRIAL EXAMINER: Did you go to work the next day?

THE WITNESS: No.

TRIAL EXAMINER: Did you go to work at any time thereafter? At Wilder.

THE WITNESS: After—I guess after three months.

TRIAL EXAMINER: You did not go to work for three months?

THE WITNESS: No, after three months I was out then I went in for one and a half day.

TRIAL EXAMINER: When?

Q You say you were out for three months, you did not go to work.
A Yes.
[502] Q Then you came back to work at one point, right, about three months later?
A Yes.
Q This was around Christmas time?
A After Christmas time, after Christmas time.
Q You went back to work and you stayed there a day and a half?
A Yes.
Q Why did you stop coming to work after that?
MR. GREEN: I object, he is asking for a subjective state of mind. Besides which three months after this man started picketing is totally irrelevant.
TRIAL EXAMINER: I think I will allow the answer to that question.
You may answer.
Q Why did you stop working after you came back? Did anyone say anything that caused you to leave?
A No, no, nobody said something to me.
Q Why did you come back a day and a half and then leave?
A I would say just a funny feeling, you know, most of the guys still out there.
Q Did they say anything to you when they saw you go in to work?
A No.
Q They did not say a word?
[503] A I can't remember.
Q You mean, you walked through this picket line and you went in the plant to work and then you walked out again at the end of the day and nobody said a word to you?
A So far as I know nobody said—
Q You did not hear them say anything to you? Didn't they yell "Scab"?
A No, I can't remember. Maybe—
Q Did they say "Hello" to you when you went to work?
A No, nothing.

Q They did not say a word?
A No.
Q You went to work that morning, were there people on the picket line picketing with signs?
A Most of the guys was sitting in the car.
Q They weren't picketing?
A That's it, yes.
Q But they saw you walk in to work?
A Yes.
Q And nobody said anything?
A No.
Q Mr. Hernsdorf, what is your address?
A 29 Mechanic Street.
Q How far away from the plant is this?
A Three houses.
[504] Q Three doors away from the plant?
A Yes, yes.
Q About 50 feet away?
A Something like that.
Q Every day the pickets would park their cars in front of your house? Frequently—
A Not exactly in front from my house, I would say the next door, next house.

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[507] TRIAL EXAMINER: Mr. Hernsdorf, after the 12th of October, the day that the pickets first appeared in front of the plant, as I understand it you worked one and a half days after that time sometime after Christmas; is that right?
THE WITNESS: Yes.
TRIAL EXAMINER: That is the only time you worked at the plant?
THE WITNESS: Yes.
TRIAL EXAMINER: Since that date?
THE WITNESS: Yes.
TRIAL EXAMINER: Did you go back to the vicinity or to the picket line around the plant during that period?
THE WITNESS: Around when?
TRIAL EXAMINER: After October 12, the day when you first saw the pickets. Did you go to the gates of the plant or the picket line after that date?

THE WITNESS: On the picket line, yes.
TRIAL EXAMINER: Go ahead.
Q When was it that you went back to the picket line after October 12th?
A October 13th, next day.
Q You went the next day?
[508] A Yes.
Q What time did you get there during the day?
A Morning hours, in the morning.
Q What did you do when you got there?
A I walked with the guys around the picket line.
Q Did you carry a sign?
A No, no, I never carried a sign.
Q How long did you walk around with it?
MR. GREEN: I'm sorry.
Go ahead.
A Exactly I don't know.
Q About a half an hour?
A No, longer.
Q About an hour?
A A couple of hours.
Q Then you went home?
A No, then we stopped sometimes to go around.
Q Did you go back on the 14th of October, the next day?
A The next day, this I can't remember.
Q You only went around that one day, October 13th; is that correct?
MRS. MORIO: Objection, that's not what he testified.
A I was a few days out there too, but exactly I was October 14th down there because I didn't mark down the date.
[509] Q How many days would you say that you went on the picket line?
A A few days anyhows.
Q Three days?
A More.
Q Four days?
A How many days exactly I don't know.
Q Was it less than—
A Because I didn't count the days.

Q Did you picket for less than five days?
A No, no, more than five days.
Q Was it less than ten?
A Like I said, I didn't count the days, you know. Like I said, a few days.
Q A few days?
A A few days anyhow, you know.

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[542] MR. ROSENTHAL: Will the reporter mark this document as Respondent's Exhibit 4. It is a three-page document in the form of an affidavit which is unsigned.

(Thereupon, document referred to was marked Respondent's Exhibit No. 4 for identification.)

Q Mrs. Hernsdorf, I now show you a three-page document, handwritten, which is marked for identification as Respondent's Exhibit 4.
I ask you to read this document and then I will ask you some questions about it.
TRIAL EXAMINER: Off the record.

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[545] TRIAL EXAMINER: On the record.
As I understand Mr. Rubinstein is objecting to the reading of the statement to the witness. That objection is overruled.
Would you read the statement into the record?
MRS. MORIO: Mr. Trial Examiner, it is understood we are reading it in because of the difficulty of the handwriting. We do not know the purpose for which Mr. Rosenthal is going to offer it. We observe our right to reject it.
TRIAL EXAMINER: All right.
MR. GREEN: "State of New York, County of Orange. Helmut Hernscord, being duly sworn deposes and says—"
TRIAL EXAMINER: Mr. Hernsdorf, you listen. You will be asked whether or not this was your statement to Mr. Green.
MR. GREEN: "1, I reside at 29 Mechanic Street, Port Jervis, New York. 2, I am presently employed at

A and W Products. I was previously employed at Wilder Manufacturing Company from about August 9, 1965, to about October 12, 1965.

"3. —"

TRIAL EXAMINER: Mr. Hernsdorf, as this is being read to you, in order that we don't have to read it to you again, [546] if there is any parts of this statement that you think is untrue, would you stop Mr. Green and tell us that that is not the fact?

Do you understand me?

THE WITNESS: Okay.

TRIAL EXAMINER: If you don't say anything we will assume that it is all true and this is what you told Mr. Green. Do you understand?

THE WITNESS: Yes, I understand.

TRIAL EXAMINER: Go ahead, Mr. Green.

MR. GREEN: "On or about October 12th, after the men walked out—" sorry, "after the men walked," no 'out'. "I worked till noon. I went outside after lunch. One of the employees, Dominic Caliciotti, asked me to join us. Hissam then gave me a card and asked me if I want to sign it. I signed the card. I believe I read the card. I don't recall anyone telling me what the card was for, but I figured it was to join the union."

THE WITNESS: That's right.

MR. GREEN: "No one threatened, coerced or in any way pressured me into signing this card."

THE WITNESS: Right.

MR. GREEN: "During the afternoon of October 12th, 1965 I was on the picket line. I also picketed after that day but not regularly."

[547] THE WITNESS: That's correct.

MR. GREEN: "And I picketed in October, November, December, and for some time in January."

THE WITNESS: That's correct.

MR. GREEN: "In or about January, 1966, after Christmas, I decided I wanted to go back to work. I told this to Hissam in January, and Hissam told me that I should wait one week because Mr. Rubinstein would come down and we would have to see if the people were willing to stay out or not."

THE WITNESS: That's right.

MR. GREEN: "I went to that meeting. At this meeting the majority of the men decided to stay out."

THE WITNESS: That's correct.

MR. GREEN: "Also in about January I heard Hissam speaking to some of the strikers and I heard him say that my wife, who works at A and W and is under contracts with the union, might have to suffer if I went back to work."

THE WITNESS: Right.

MR. GREEN: "I went back to work for Wilder in mid-January. I worked there one and a half days. I stopped because I didn't want to get my wife involved and most of the men were still out."

THE WITNESS: Right.

MR. GREEN: "After I left work, I told Hissam that I [548] would stay out again. I told him that I was sorry that I went back to work. I did not explain to him why I was sorry that I went back to work. I don't recall saying that I couldn't stay inside with the rest of the men. I was never told directly by Hissam or anybody else that my wife might suffer if I went back to work."

TRIAL EXAMINER: That's all at this point from you, Mr. Green. You may proceed now, Mr. Rosenthal.

Q (By Mr. Rosenthal) Mr. Hersndorf, did Mr. Green ask you to sign that statement when he was finished writing it down?

A I think about then last week. I really can't remember if Mr. Green ask me to sign it or not. I don't know. I'm sorry, I can't remember.

Q If he has asked you to sign it was there any reason why you would not have done so?

MR. RUBINSTEIN: Objection.

MRS. MORIO: Objection.

MR. GREEN: Objection.

TRIAL EXAMINER: Sustained.

Q You did not sign the statement, did you?

A No, I didn't sign the statement, no.

Q But everything that was read you by Mr. Green was true?

A This here—yes, sir, yes.

TRIAL EXAMINER: Is that what you told Mr. Green? Did you [549] tell Mr. Green the things that he read to you? Did you tell them to him?

Do you understand?

THE WITNESS: If I tell Mr. Green?

TRIAL EXAMINER: Yes, what he had written down. Did you tell him what he has written down?

THE WITNESS: Yes.

TRIAL EXAMINER: All right.

MR. ROSENTHAL: I move that respondent's Exhibit 4 be received in evidence.

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TRIAL EXAMINER: Well, I think that it is in evidence anyhow, in view of the fact that the witness testified that the statements therein were true. I will admit it.

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[557] FRED HICKS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Would you be seated, please, and give us your full name?

THE WITNESS: Frederick Hicks.

TRIAL EXAMINER: Your address, Mr. Hicks?

THE WITNESS: Boemhler Road, Sparrow Bush, New York.

DIRECT EXAMINATION

Q (By Mr. Green) Mr. Hicks, as of October 12th by whom were you employed?

A Wilder Manufacturing.

Q How long had you worked at that company?

A I believe it was approximately three years.

Q In what capacity did you work?

A Machine operator.

[558] Q Are you working there at the present moment?

A Yes, sir.

Q Mr. Hicks, did you sign a card for the Textile Workers Union of America?

A Yes, sir.

Q I show you General Counsel's Exhibit 4 and ask if this is your signature?

A Yes, sir.

Q Is that the day you signed it?

A Yes, sir.

Q Where did you sign this card?

A At Mr. Hissam's house.

MR. GREEN: Thank you.

Let the record show that I am handing the cards over to Mr. Rosenthal.

MR. ROSENTHAL: Do you have any further questions of this witness?

MR. GREEN: Yes, I have not finished yet.

MR. ROSENTHAL: Are you offering this card in evidence?

MR. GREEN: It is in evidence.

MR. ROSENTHAL: Proceed.

Q Mr. Hicks, I show you General Counsel's Exhibit 5 in evidence, and ask you if your signature is on this?

A Yes, sir.

Q Is October 11, 1965 the date you signed it?

[559] A That's right.

Q Where did you sign this?

A That was signed at Mr. Hissam's house.

TRIAL EXAMINER: Was that signed the same time you signed your card?

THE WITNESS: Yes, sir.

Q (By Mr. Green) Mr. Hicks, did you picket on October 12th, 1965?

A Yes, sir.

Q Did you picket—

MR. ROSENTHAL: Objection, I suggest we don't ask the witness any more leading questions.

Q How long thereafter did you picket?

A For seven months, probably.

Q Around Thanksgiving were you picketing?

A Yes, sir.

Q If you know, was James Ehre picketing around that time?

A Yes, he was.

MR. ROSENTHAL: Objection.

TRIAL EXAMINER: What was that question? If he knows what?

MR. GREEN: If he knows, was James Ehre picketing at that time, Thanksgiving.

TRIAL EXAMINER: I will allow the question.

Q If you know, was James Stempert picketing at that time?

[560] A Yes, he was.

Q Do you recall, if you remember, any other people picketing about that time?

A Helmut.

Q Hernsdorf?

A Hernsdorf.

Q Yes.

A Jack Munoz was out there.

TRIAL EXAMINER: What is the significance of Thanksgiving? As against any other day?

MR. GREEN: We want to show that at least—the records show that at least through Thanksgiving, the month of November, there was regular picketing by everybody. We did not call James Stempert and James Ehre to save a little time, therefore, we don't know how long they were on the picket line. I don't know if the witness could go and say the exact date at which time James Ehre or James Stempert picketed, but I think I can recall Thanksgiving as a time which they picketed, it was more than a day, a week, it was several months.

TRIAL EXAMINER: Very well.

MR. GREEN: All right, I have no further questions.

TRIAL EXAMINER: Mr. Rosenthal, you have any questions?

Mr. Rubinstein, if you have any questions of a witness will you speak up and let me know before I turn him over to [561] Mr. Rosenthal.

MR. RUBINSTEIN: Okay, I will.

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[565] IRVING HUGHSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Would you be seated, and give us your full name and address.

THE WITNESS: Irving Hughson, 12 Second Street, Port Jervis.

TRIAL EXAMINER: Very well.

Off the record.

(Discussion off the record,)

HEARING OFFICER: On the record.

Go ahead, Mr. Green.

[566] DIRECT EXAMINATION

Q (By Mr. Green) Mr. Hughson, as of October 12th by whom were you employed? As of October 12th, by whom were you employed?

A October 12th—Wilder Manufacturing.

Q How long had you been employed there?

A Oh, about fourteen years.

Q In what capacity were you employed?

A Machine shop operator.

Q Mr. Hughson, did you sign a card for the Textile Workers Union of America?

A Yes, sir.

Q I show you General Counsel's Exhibit 4-I in evidence, ask you if this is your signature?

A Yes.

Q Is that date, October 12th, 1965 the day you signed it?

A Yes.

Q Where did you sign this card?

A By the picket line at Wilder Manufacturing.

Q After October 12th, did you return to work?

A No, I didn't.

TRIAL EXAMINER: Have you ever returned to work?

THE WITNESS: Yes, I returned January 20th.
MR. GREEN: I have no further questions.

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[570] CECIL FRANK TONKINSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

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[581] CROSS-EXAMINATION

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[588] Q Mr. Tonkinson, let's rephrase the question for you.
Did you stay away on October 13th, the day after the [589] strike—
A Yes.
Q —because you were striking in sympathy with the employees or some other reason?
MR. RUBINSTEIN: I object, I think it is a leading questions.
TRIAL EXAMINER: Overruled.
Why did you stay away on the second day, that's what he wants to know.
THE WITNESS: Because there might have been some question of violence.
MRS. MORIO: Objection, Mr. Trial Examiner.
TRIAL EXAMINER: Overruled.
Q Had you received any information at that time concerning a fight that another employee had had with the union?
MRS. MORIO: On what day is this, can I ask?
MR. ROSENTHAL: I said, "On October 13th."
A Not on October 13th, no, I don't believe.
Q Were you on strike on the 13th or were you remaining at home because you were afraid there would be violence?
A Yes, remained home because I was afraid there might be some trouble.

MRS. MORIO: Objection, Mr. Trial Examiner, this is highly objectionable. The witness has a subjective state of mind which is clearly not relevant. You can't tie what [590] he thought might occur.
TRIAL EXAMINER: Don't you think then that it is appropriate for the General Counsel to ask this man whether he joined the pickets and was on strike and indicate what his purpose was of staying away?
MRS. MORIO: No, Mr. Trial Examiner, the witness—
TRIAL EXAMINER: As the records stands at this point the inference is that the man stayed away because he was sympathetic to the union. His statement is that he stayed away not because he was sympathetic but that he was afraid to go in. It is pertinent evidence.
Go ahead, Mr.Rosenthal.
Your objection is overruled.
Q Mr. Tonkinson, did you at any time during the course of the strike engage in any picketing?
A No.
Q Did you ever walk on the picket line with the pickets?
A No.

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[598] Q Did you hear about anyone having their automobile damaged when they went to work during the strike?
A No.
Q Did you hear about an incident involving nails and tacks being thrown on the driveway?
MRS. MORIO: Objection, hearsay.
TRIAL EXAMINER: Overruled.
A Yes.

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[599] REDIRECT EXAMINATION

Q (By Mr. Green) Now, you mentioned this thing about Hughson, could you tell us how you heard about that?

A My wife works with Hughson's sister, and she told my wife, and that's how I heard.
Q And your wife told you?
A Yes.
Q In other words, you got it through thirdhand sources?
A That's right.
MR. ROSENTHAL: Objection, this man is still your witness, Mr. Green. I'd appreciate it if you do not lead him.
MRS. MORIO: We are not impeaching him, Mr. Rosenthal.
MR. ROSENTHAL: I think—I did not say "impeach." I said you were leading him.
Q Did you hear anything from Hughson?
A I asked him about this. He said there was no fight.
MR. ROSENTHAL: I am going to object to this unless we establish when in point of time Hughson told him there was nothing to it.
TRIAL EXAMINER: He said a month or so later. However, [600] did not indicate when he first heard about it.
When did you first hear about the affair with Hughson?
THE WITNESS: Whenever it happened to be.
TRIAL EXAMINER: How long after the strike commenced?
THE WITNESS: I don't know.
TRIAL EXAMINER: Was it a short time or long time?
THE WITNESS: Whenever Hughson had it told my wife and my wife told me about it.
TRIAL EXAMINER: How long after the strike?
THE WITNESS: I don't know.
TRIAL EXAMINER: You don't know?
THE WITNESS: No.
TRIAL EXAMINER: All right.
Q (By Mr. Green) You say you mentioned this to Robert Derse at a social function at church?
A That's right.

Q I wonder if you have any idea when that was, approximate time?
TRIAL EXAMINER: I didn't hear any testimony that he told Mr. Derse in church.
MRS. MORIO: He said social function, he said he told Robert Derse at a social function in church.
TRIAL EXAMINER: I missed that. Go ahead.
MR. ROSENTHAL: He said he told him after the strike [601] had commenced.
TRIAL EXAMINER: When did that occur, take place?
THE WITNESS: I think it was probably Thanksgiving, some place around there.
Q (By Mr. Green) On October 12th you left to go to the doctor around three-thirty; is that right?
A That's right.
Q Prior to the time you signed the card had anybody—had any of the pickets tried to speak to you, did you speak to any of the pickets?
A No.
Q Did any of them threaten you in any way?
MR. ROSENTHAL: Objection.
TRIAL EXAMINER: You know what "threaten" means?
THE WITNESS: Yes.
TRIAL EXAMINER: I will allow the answer.
MR. ROSENTHAL: I think the witness just testified that no one spoke to him. Now, he is asking for a conclusion of the witness, leading the witness.
TRIAL EXAMINER: A threat could be a menacing gesture.
Go ahead, answer it.
A No.

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[606] SY COHEN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated and give us your full name.

THE WITNESS: Sy Cohen.

TRIAL EXAMINER: And your address?

THE WITNESS: 602 Warren Street, Hudson, New York.

DIRECT EXAMINATION

Q (By Mr. Green) Mr. Cohen, by whom are you employed?

A Textile Workers Union of America.

Q In what capacity?

A Representative.

Q How long have you been employed by that union?

A Twenty odd years.

Q Mr. Cohen, are you familiar with the Wilder Company?

A Yes.

Q Do you know Mr. Walter Derse?

A Yes.

[607] Q Would you please tell us how you first met Walter Derse, the circumstances, what happened?

A On October 12th we went to the company plant and asked for Mr. Derse.

Q "We"?

A Myself and William Hissam.

After some waiting he arrived. We introduced ourselves to him.

TRIAL EXAMINER: Mr. Cohen, tell us what you said rather than what you did.

THE WITNESS: Well, I told him I was a representative of the Textile Workers Union and that a majority of his employees designated us as their bargaining unit, we would like to talk to them.

Q So what happened?

A We went into his office.

Q Excuse me, we have sort of been interrupted. Why don't you start from the beginning and give us what happened.

TRIAL EXAMINER: Mr. Cohen, before you resume your testimony, would you tell us who was present besides yourself?

THE WITNESS: Mr. Hissam was present with me.

TRIAL EXAMINER: Just you and Mr. Hissam?

THE WITNESS: Yes.

[608] TRIAL EXAMINER: This is on what date?

THE WITNESS: October 12.

TRIAL EXAMINER: Where did you first meet Mr. Derse?

THE WITNESS: At the company plant.

TRIAL EXAMINER: Was it in his office or some other place?

THE WITNESS: No, his office, in the lobby of his building, and then he took us into his office or escorted us into his office.

Q (By Mr. Green) What did you say to him, what did he say to you? Start from the beginning.

A Well, I told him that we represented a majority of his employees and we'd like to work—sit down and discuss the—ask for recognition. I presented to him signed cards, designation cards. There were eleven signed cards and two unsigned cards in the deck.

We discussed the matter for awhile. This conversation had basically stated that he could not take care of this by himself, he would have to discuss this with his brothers, and that one brother was out of town.

TRIAL EXAMINER: What did you do with the cards?

THE WITNESS: I presented it to him by laying it on the table.

Q What did he do?

A He picked it up and went through them.

[609] TRIAL EXAMINER: At any time while he was going through the cards did he mention the name of any individual who appeared on the cards?

THE WITNESS: No, didn't mention the names, but he did notice the fact that there were two blank cards in the deck.

TRIAL EXAMINER: Did he take enough time in going through the cards to have observed the signers?

THE WITNESS: Oh, yes, by all means.

TRIAL EXAMINER: Go ahead.

THE WITNESS: We were in there twenty minutes to a half hour.

Q (By Mr. Green) Where was these two blanks?

TRIAL EXAMINER: There was not an objection made to that question, but I would sustain it if one was made. I think the only pertinent evidence is what transpired in that room.

Q Go ahead.

A I told him we had the majority, we're asking for recognition for the production and maintenance employees. He questioned the two blank cards, and I told him they're in there because two people who were signified they were going to sign.

We haven't been able to get their signatures as yet and that is how they happened to be there. Kept talking about [610] recognition, never raised the question of majority, never raised any question.

MR. ROSENTHAL: Objection, witness is testifying as to conclusions now.

TRIAL EXAMINER: Yes.

Just tell us what he said. We will be able to draw inferences from what was not said.

THE WITNESS: He said he would have to discuss this with his brothers and family, and I kept pushing the fact, "Well, why don't we discuss this now?" I even asked him if he had an important order would he have to wait before he does anything to take it up with his brothers and his family, and kept moving on that line, and I got the same answers, he'd have to take it up with his brothers and he kept moving on out.

We also asked him at the time if we could bring in a member, some members of the work force with us into the room, and he denied us that privilege, he said, no.

TRIAL EXAMINER: Was there anything said about when he might be in a position to give you a firm answer as to what the company's position was going to be?

THE WITNESS: No. I asked for that. I said, "Would you be able to then give me an answer tonight, would be be able to give me an answer tomorrow?" And he kept saying he does not know, and he would not give me a firm position.

[611] TRIAL EXAMINER: Did he say why he did not know?

THE WITNESS: He said his brother was away out of town and he couldn't get in touch with his brother. This was part of the conversation with the orders. As I kept, I kept asking, "If you had an important order, you mean you couldn't get in touch with your brother on that?" I kept moving in that vein hoping to pin down a time for a meeting or discussion with him on this matter. It just was to no avail.

TRIAL EXAMINER: His response was what? How was it left when you walked out? What was the last thing said by him, last thing said by you?

THE WITNESS: I said to him, "If I can get no decision from you, the boys may take the position of a strike."

MR. GREEN: Go on, I'm sorry.

THE WITNESS: And he actually said, "If this is what they want, that's it."

I said, "I'd like to know a date, otherwise I have to take this matter up with my State Director. I would like to know what date you can give us, whether you do—" or some sort of comment, and there was no comments coming, and the only thing was time, he has to take it up with his brothers.

TRIAL EXAMINER: Was there anything said in the [612] conversation which would have advised Mr. Derse that the minute you walked out of the room the employees were going to strike?

THE WITNESS: Yes, I would gather there was, yes, because I told him that because of the—unless he gives me a definite answer of time, I'd have to take this matter up with the State Director and I'd also mention the fact that the—there would be a strike.

TRIAL EXAMINER: Was that all that was said on the subject of strike?

THE WITNESS: What?

TRIAL EXAMINER: Was that all that was said on the subject of strike?

THE WITNESS: Yes.

Q (By Mr. Green) You said "definite time," what did you mean by that?

A Answer—tell us whether he would recognize us or after he discovered it or wouldn't recognize us or whatever came up. I asked for recognition, and all I got was a negative reply. He didn't say anything negative to the facts of recognition, he kept negative on the fact that he needed time, and knowing the background here, I had to make a decision.

Q What, if anything, was he doing with the cards during this examination?

[613] A He was scrutinizing them all during the conversation. In fact, he put them down once and picked them up again.

Q Did he talk about anything else?

A Yes. We asked if we'd be able to contact one of the people in his shop, and he said—at first he said no, and then he more or less, we kept pushing on that, and he said, "If it's important, you contact him. We'll see." He did not say, "You can't contact him." If somebody's mother is sick or there is an accident in the factory. We don't allow telephone calls for the workers. Sometimes if it's important we do.

We left in an amicable manner as if so say you will call maybe you won't and left on that basis.

TRIAL EXAMINER: Did you indicate to Mr. Derse what your purpose was in contacting the employees in the plants?

THE WITNESS: No.

TRIAL EXAMINER: I take it you did not ask Mr. Derse for permission to bring any of the plant employees into this meeting.

THE WITNESS: Yes, we did, I mentioned that a few moments ago.

TRIAL EXAMINER: What did you say on that subject?

THE WITNESS: I told him that we'd like to bring a few employees in with us, and he said no on that, they are on production and we wouldn't interfer with that.

[614] TRIAL EXAMINER: All right.

Q (By Mr. Green) Mr. Derse kept talking about his brother being away. What, if anything, was your response?

A I think I answered that I kept asking as far as important matters of business, if he had any what would he do.

Q In other words, you asked him to call him?

A Yes.

Q How long would you say this meeting took place?

A Meeting, about half an hour.

Q What happened, what did you do after you left?

A Well, I called the State Director—

Q From where, sorry?

A From an outside pay phone.

Q In other words, you and Hissam left?

A Yes.

Q Then what did you do?

A We discussed the matter, and after I called the State Director, Hissam made a call to the plants to call one of the workers and informed him of the company's answer.

Q Yes.

A Then bu the time I made another telephone call and by the time I got back to the plant—

Q I'm sorry, did you call Derse again that day?

A Yes, that's correct.

Q What was the conversation then? If you can recall?

[615] A I told him of our—that the director and I had a discussion and told him of the decision that we came to the conclusion that he was stalling us and on that basis that he refused recognition and on that basis there was no other alternative but to call a strike until he recognized us.

TRIAL EXAMINER: How long was that after you had your first conversation with Mr. Derse?

THE WITNESS: I would say fifteen minutes.

TRIAL EXAMINER: What was his response?

THE WITNESS: It was a blanket response, is if, do as you please. There wasn't much response.

TRIAL EXAMINER: What did he say?

THE WITNESS: There was no answer as such.

TRIAL EXAMINER: He said nothing?

THE WITNESS: His answer, from what I can recall at this point, was a negative reply on the basis of —"Do as you please," or something like that, and let it go at that.

Q (By Mr. Green) Going back to that meeting, I am sorry, you showed him the cards?

A Yes.

Q What, if anything, did Mr. Derse say about these cards? Or did he say antyhing?

A Don't recall.

[616] Q Did he say anything about the blank cards?

A Yes.

Q What did he say?

A He asked why those blanks were there and I mentioned the fact that we had two other people signify that they were willing to sign cards and they were in there for that purpose on this.

Q Aside from this one thing about the blank cards, did he say anything else about the cards?

A No.

Q You said that you asked for recognition amongst production and maintenance workers.

MR. ROSENTHAL: Objection, must counsel keep repeating. He has gone over it twice already.

TRIAL EXAMINER: I will sustain the objection.

Q What did Mr. Derse say about the unit you requested?

A Nothing.

Q The following day did you have occasion to speak to Mr. Derse?

A Yes, I called him the following day—

TRIAL EXAMINER: Before we get to the following day. You talked to him how many times on the first day?

THE WITNESS: Twice, once on the phone and once in person.

TRIAL EXAMINER: After you talked to him on the phone then [617] what did you do?

THE WITNESS: I went down towards the picket line—

TRIAL EXAMINER: Was the picket line there before you talked to him the second time?

THE WITNESS: No, it probably was—no, because as Hissam talked to this person I picked up the receiver and called Mr. Derse, and the whole difference was less than a minute.

TRIAL EXAMINER: You mean it was simultaneous, while you were calling Mr. Derse Hissam was calling people out on strike?

THE WITNESS: No, Mr. Hissam reported the actions of the company to one of the employees. As Mr. Hissam put the phone down I picked up the phone, inserted a dime in the coin box and called Mr. Derse.

Q (By Mr. Green) Did you hear Mr. Hissam talk to this employee?

A Right.

TRIAL EXAMINER: Just before you talked the second time to Mr. Derse?

THE WITNESS: Right.

TRIAL EXAMINER: Will you tell us, to the best of your recollection, what Mr. Hissam said to the employee.

THE WITNESS: He told the employee, he relayed the, let's say, the conversations that went on between myself and [618] Mr. Derse at the company office.

TRIAL EXAMINER: Did he make any reference to the employees staying in the plant or coming out of the plant?

THE WITNESS: No, I don't think he had to make reference to it one way or the other because they already made a decision. He explained it to them, and their decision was that they would walk out if they didn't get recognition.

TRIAL EXAMINER: The conversation between Mr. Hissam and the employee he called, you heard no reference to a walkout? Is that right?

THE WITNESS: No, I didn't say that.

TRIAL EXAMINER: Tell me what it was.

THE WITNESS: Let me say this, in my own mind I knew what the consequences was going to be, and

whether he referred to it in such or referred to it without describing the thing as so didn't matter because didn't impress me one way or the other, I knew what's going to happen.

TRIAL EXAMINER: In your mind you knew that if he called the employees they'd go out on strike, is that what you are saying?

THE WITNESS: There is, in my mind, what the employees said they were going to do.

TRIAL EXAMINER: If you were aware of that fact, why did you not call Mr. Derse before Mr. Hissam called the [619] employees?

THE WITNESS: I think our job was to represent these people, and I think if we were able to give a message to these pepole first and also probably at the time I figured if I talked to Mr. Derse and told him what we were going to do we probably wouldn't have been able to contact the people in the plant. Maybe this was it. This seems the most logical in my might right now. Wouldn't it in yours?

TRIAL EXAMINER: I am simply trying to find out what motivated you to get them out of the plant so rapidly.

THE WITNESS: I will give you the motivation, if you wish. Ask the question.

TRIAL EXAMINER: He wanted to talk to his brother.

THE WITNESS: The past history is here every time we tried to organize this shop. People were hired or our majority was—

MR. ROSENTHAL: I object.

THE WITNESS: A question was asked by the examiner what motivated and I am answering.

MR. ROSENTHAL: Fine, I will cross-examine you on that point.

TRIAL EXAMINER: We have evidence now that the employees signed strike authorization because of the fact that they felt that their union organizational drive would [620] fizzle out if they didn't.

But, in any event, your testimony is that the employees were on their way out before you called Mr. Derse to tell him the union was going to strike; is that correct?

THE WITNESS: No, we informed the workers what would happen. I called Mr. Derse and told him what our decision was.

Now, there could just as well have been that the workers didn't walk out.

MRS. MORIO: Mr. Trial Examiner, the witness testified that he told Walter Derse during the first meeting that it was possible for the employees to walk out. I don't remember his precise language.

TRIAL EXAMINER: I remember his testimony, and the witness is very capable of putting his thoughts into words.

THE WITNESS: Thank you, sometimes I wonder.

TRIAL EXAMINER: Very well, go ahead.

MR. GREEN: Where were we?

TRIAL EXAMINER: The second conversation.

Q (By Mr. Green) You had a second conversation with Walter Derse?

A I called him again, asked him if he heard anything from his brothers. I told him, "As a matter of form I am asking you for recognition once more. I have additional cards [621] that I expected yesterday, I have them today." And they are ready for his scrutinization or review or whatever may be, and he told me that he was not able to make any—he had no answer for me at this time on this basis. I asked him if he made contacts with his brother. He said no, and talked about that. I also—what else? I also told him that I surely wouldn't like to see this thing continue, I'd like an answer as quickly as possible as I'm going away for two or three days to a states convention and would like an answer before I go.

I also mentioned that I might be in the Port Jervis area, and he says, "Wonder if I should call him," and he says, "If you want to call, call, if you don't, don't." On that basis, and left me with the impression that it would be futile for me to call him, maybe when he was

ready he would call me, and that was about the answer on that basis.

Q Did he ever call you?

A No, he has never called me.

TRIAL EXAMINER: Will you tell me, were there any comments made about the fact that there was a picket line out in front of the plant?

THE WITNESS: No.

TRIAL EXAMINER: Did you not mention that to him at all?

THE WITNESS: No.

[622] TRIAL EXAMINER: And he did not mention it to you?

THE WITNESS: No.

Q (By Mr. Green) Did you say anything about the units requested? The units that you requested, did he say anything to you?

A I mentioned that to him.

Q No, but did he say anything to you?

A Not ready, didn't contact his brother, and that was the basis, and this was his complete answer.

Q Did you have occasion to speak to Walter Derse again?

A I'd like to state this, I also contacted the Federal Mediation—

MR. ROSENTHAL: Objection, not responsive to my question. It's irrelevant and immaterial.

TRIAL EXAMINER: Sustained.

Q Please answer the question as to whether or not you spoke to Walter Derse again.

A Yes, I did.

Q Will you describe the circumstances on that, when that was?

A Well, Mr. Rubinstein and myself after a meeting in another plant in the area—

TRIAL EXAMINER: What was the date, Mr. Cohen?

THE WITNESS: You got me. I don't recollect the date offhand. If I can get my notes I can give it to you.

[623] TRIAL EXAMINER: You may check your notes and give us the dates.

Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

THE WITNESS: I do know as we—

TRIAL EXAMINER: Were you going to tell us the dates?

THE WITNESS: I can't give it to you, I don't have my records.

TRIAL EXAMINER: Can you give us an approximation of it? How long after the strike, about?

THE WITNESS: I think it was within a month.

TRIAL EXAMINER: All right.

Now, tell us what the conversation was, as Mr. Green asked you.

THE WITNESS: We went up to the plants, the Wilder's plants, and we talked with some of the strikers, and they told us that Mr. Derse was out. Within a few minutes, while we were standing there, we seen him arrive, and we walked towards him.

At this time Mr. Hi-sam joined us, too, and said, "Hello," and started to walk, and Jack asked him ready to sit down and recognize us, talk to us, and he pulled out a paper out of his shirt pocket with the name of his attorney on it and turned it over to Mr. Rubinstein and stated, "I [624] have nothing to say, contact my attorney."

Q Is that the extent of the conversation?

A That was the extent of the conversation.

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[665] WALTER DERSE

a witness called by and on behalf of the Respondent, having been previously sworn, resumed the stand and testified as follows:

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[691] REDIRECT EXAMINATION

Q (By Mr. Rosenthal) Mr. Derse, what is your official title with Wilder Manufacturing Co., Inc.?
A I'm Secretary.
[692] Q Are you a stockholder?
A I am.
Q Can you tell me who the other stockholders are?
A Robert Derse, Arthur Derse, Jr. and Arthur Derse, Sr.
Q What is the proportion of stock, purchase wise, held by each stockholder?
A My father has the controlling interest.
Q You father owns over fifty-one per cent of the stock?
A Yes, and he has the controlling interest.
Q Could you tell me which individuals comprise the board of directors of the company?
A Arthur Derse, Sr., Robert Derse and Walter Derse.
TRIAL EXAMINER: Mr. Green, I notice that Arthur F. Derse, Sr., has been made a respondent. Is it the General Counsel's position that in the event the Trial Examiner recommends that an order be issued in this case that it be issued against Arthur F. Derse, Senior, President?
MR. GREEN: Yes.
TRIAL EXAMINER: On what basis?
MR. GREEN: He is an employer within the meaning of the Act.
TRIAL EXAMINER: An employer within the meaning of the Act?
MR. GREEN: Section 2(2) of the Act.
TRIAL EXAMINER: What facts support that conclusion?
[693] MR. GREEN: He owns the majority of the stock, and is the president of the company.
TRIAL EXAMINER: That is the fact that you base that conclusion on?
MR. GREEN: That's right.
TRIAL EXAMINER: All right.

Q (By Mr. Rosenthal) Could you tell me how old your father is, Mr. Derse?
A On October 12th of 1965 he was 78 years old.
Q Could you tell me to what extent he is—to what extent prior to October 12th he was actively engaged in the business other than being the president?
A He was not actively engaged. Come in occasionally whenever he felt.
Q What duties of specific functions definite?
A Only president, that's all.
MRS. MORIO: I am sorry?
THE WITNESS: Only president. Had no other duties.
Q For how many years prior to October 12th, 1965 did your father have an inactive status in the business?
A Well, I would say that for a period of fifteen years my mother was confined, he was in and out a great deal and he didn't take a real active part. I would say in the last four, five years he didn't take an active part. This is merely quessing. I can't pinpoint any year.
[694] Q For quite a period of time he has been inactive?
A Yes.
Q Tell me what the policy or practice of the corporation is with regard to the making of policy decisions in the business?
A Any policies are made by our executive control, and these policies are made at the meetings that we have, my two brothers, myself, and my father, if he is available. They are made only in the evenings. The reason for that is that we do not have any private or soundproof offices, so all of the major policies are done at that time.
Q What office does your brother, Arthur Derse, Jr., hold?
A He's vice president.
Q And Robert Derse?
A He's treasurer.
Q Will you describe the duties and area of responsibility of Arthur Derse, Jr.?

A Arthur Derse, he is in sales and engineering, he handles the purchasing department and the purchasing and he does research and development on new items.

Q Your brother Robert, what are his duties and functions?

A Robert is the treasurer and he is the comptroller. He handles the money.

Q Does he also handle the payroll and the payroll records?

A It comes under his jurisdiction.

[695] Q Will you tell me what your duties and function are?

A Well, I'm the sales and advertising manager, and I am also the general manager of the operation.

MR. GREEN: I am going to object, this is conclusionary. I don't know what he does.

TRIAL EXAMINER: You may go into it on cross-examination, I think generally the term general manager is pretty wellknown.

Q A general manager, what specific areas of responsibility do you have?

A I'm responsible for the entire operation, the sales, the advertising, production and all problems relating to anything of this nature is under my jurisdiction.

TRIAL EXAMINER: Is your father, who is the president, superior to you?

THE WITNESS: Yes, he is, he's superior to me. I act a great deal as his right arm, let's put it that way.

TRIAL EXAMINER: You are the individual who is next under him in command; is that right?

THE WITNESS: That's right, but I must keep him constantly informed as to what goes on.

TRIAL EXAMINER: Very well.

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[756] WALTER DERSE

resumed the stand and testified as follows:

DIRECT EXAMINATION

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[758] Q Can you tell us the names of the employees who returned to work and when they returned to work?

A I can tell you who. Frank Tonkinson and Irv Hughson were the first two to come in.

Q When did they return?

A I'd say it was in January, I believe, January.

Q All right.

[759] A The next one was Shaw, I believe went and came next, and I believe that was in, oh, the latter part of March, early April.

Stempert came back, Ehre and Hicks came back, although they also requested to know whether they couldn't get more money, and we said we could not take them back on that, they would have to come back the same manner that they left, and they are back, I would say, about five weeks, something like that; and Vandermark, he's probably back three weeks.

Q How about Hernsdorf?

A Hernsdorf came back, he came back and he was there just a day and a half.

TRIAL EXAMINER: What happened to him?

THE WITNESS: Well, he called me up and said he was too nervous, he was afraid that if he—

MRS. MORIO: I object, this is hearsay.

MR. GREEN: This is hearsay.

MRS. MORIO: Unless he is going to call Mr. Hernsdorf as his witness.

MR. ROSENTHAL: We already got testimony on the record.

MRS. MORIO: Not on any phone conversation he had with Mr. Derse.

TRIAL EXAMINER: Complete your answer. Then I will listen to arguments.

THE WITNESS: He told me he was too nervous to come [760] back, he thought he ought to stay away. He had had these threats and he felt it was best not to come back, so he only worked a day and a half.

MRS. MORIO: We renew our motion and move to strike it on the grounds that it is hearsay.

TRIAL EXAMINER: Your motion is overruled.

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[816] Q Will you describe the events of the morning of October 12th, 1965 from the time that you arrived at the plant at approximately twenty-five to ten, you say?

A Yes.

Q Tell us exactly what happened after that.

A I arrived at the plants at twenty-five minutes to ten. I went into the lobby and then into the office, and I was stopped by one of the girls, and she said to me, "Do you know a Mr. Cohen?"

And I said, "I know several Mr. Cohens. Did you ask his where he was from?"

[817] She said, "He wouldn't tell me."

Well, I said, "Where is Mr. Cohen now?"

She said, "He is out, but he will be back."

I said, "All right, I'll go into my office and when he returns let me know, but please try and find out where he's from."

So about five minutes later, approximately five minutes later, she got ahold of me and said, "Mr. Cohen is outside, he has somebody with him."

Well, I said, "Did you find out what company is he with?"

She said, "He wouldn't tell me."

Then I said, "Well, I'll have to go out and find out what his mission is."

I went out into the lobby, and these two men were there and I asked them—

TRIAL EXAMINER: Excuse me for interrupting you at the point, but which one of the employees brought the message to you?

THE WITNESS: That was Yvonne Flannery.

TRIAL EXAMINER: All right, go ahead.

THE WITNESS: I went out and I asked what their mission was, where they were from, and Mr. Cohen introduced himself. He said he was Sy Cohen, and this was Mr. Hissam.

I said, "What is your mission?"

[818] Well, he said, "We're from the Textile Workers Union. We have something of mutual interest."

I says, "What do you mean?"

Well, he says, "We represent a majority of your employees, and we want to know whether you will recognize us as their bargaining agent."

Well, our lobby is rather small and I invited them into my office. I have a small conference table, two and a half feet by four feet, and I sat at one end and invited Mr. Hissam to sit at the other end and Mr. Cohen sat to my left.

• • • •

I asked him to repeat his mission, and he said, "We represent a majority of your employees, and we want to know whether you will recognize us as their bargaining agent."

I said, "Mr. Cohen, this is a corporation. And I have absolutely no authority to answer that question."

He said, "In other words, you refuse?"

I said, "I didn't refuse. I said I did not have the authority to answer that question."

It would be necessary for me to bring the other principals of this company and pass the information to [819] them for a decision as to how—what they would do, but I cannot give them an answer.

He says, "You know, if you refuse, we'll file unfair labor practice charges."

I said, "There's nothing I could do about it. I have no authority."

Well, he said to me, "Don't you act in emergencies?"

I said, "This to me is not an emergency."

He kept on asking, and I kept saying, "I don't know."

He said, "When will you let me know?"

I said, "One brother is in Atlantic City and I don't expect he will be back until tomorrow," and knowing that we could only get together Wednesday night I told

him the earliest I could do it was on Thursday, I could have an answer on Thursday.

He said, "I can't wait that long." He said, "I have to know. I will give you one hour. Would you rather have the men wait outside?"

I said, "I cannot do anything about it, I cannot answer the question you ask me."

* * * *

[820] I said, "I have no authority to let you talk to these men outside. The policy of our company, again I have no authority to let you inside to talk to these men. At twelve o'clock they come out to lunch, and you can talk to them, if you want outside, but I cannot permit you to do that. I have to get that authorization."

He said, "Can we call somebody in there?"

I said, "We have a policy that the only calls that are permitted to employees are emergency calls," I said, "Usually a child is sick and they want to get the father or if a boiler blew up or something like that, why, we will permit that to go through." I says, "The way that is done, you call up the operator. If it is an emergency she will give it to Jack McCaslin who will pass it on to the proper employee."

I took the cards, shoved them back. He picked them up and with that they got up. They walked out. I judge this was approximately about ten o'clock or ten after ten. We spent, I would judge, about twenty minutes, twenty-five minutes at the most.

At twenty-five minutes past ten a telephone call came through the board. According to our records it's a Mr. Cohen who called up—

Q Let me stop you there a moment.

How are you sure of the exact time of telephone call? [821] Did you keep a phone record?

A We keep a phone record of every call that comes in, and teh girl—I give you a copy of it.

Q On this telephone record, is there any indication of the time and the name of the person who calls?

A Yes.

Q Continue your testimony. You say at ten twenty-five a telephone call came in?

A It came in, and on a sheet you will note that this came in and went directly in and was answered by Jack Munoz. At ten twenty-six, one minute later, a call come through again from Mr. Cohen directed to me, he told me before he went out that in order to extend this he would have to talk to Jack Rubinstein and get permission from him to hold the strike—

MRS. MORIO: Excuse me, Mr. Trial Examiner, I'm not clear, did he say in the phone call or earlier?

THE WITNESS: No, he said earlier in my office that he would have to find out and call his superior, Mr. Rubinstein, to find out whether or not they could wait until we could give them a bona fide answer.

He called me at twenty-six minutes past ten, again on the entry there.

Immediately after they talked to Jack Munoz, and told me that their boss said they could not wait, that they were [822] going to pull the men out.

Now precisely at that same time the cards of the men that went out was punched at ten twenty-six.

MR. ROSENTHAL: At this point would the reporter mark for identification as Respondent's Exhibit 6 this document.

(Thereupon, document referred to was marked Respondent's Exhibit No. 6 for identification.)

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

The parties have stipulated that the Respondent's Exhibit No. 6 is an authentic copy of Mr. Munoz's—Jack Munoz, is it?

MR. ROSENTHAL: The time card for the week ending October 16th, there is an entry on here showing what time he punched in and what time he punched out on the second day of the work week which was Tuesday, October 12th.

TRIAL EXAMINER: That stipulation agreeable to the General Counsel?

MR. GREEN: Yes.

TRIAL EXAMINER: Yes, very well. It is accepted in evidence.

MR. ROSENTHAL: Let the record indicate that Mr. Munoz punched out at ten twenty-six.

[823] TRIAL EXAMINER: Are you offering the exhibit?

MR. ROSENTHAL: Yes.

TRIAL EXAMINER: Is there any objection to the receipt of General—of Respondent's Exhibit 6?

MR. GREEN: No.

TRIAL EXAMINER: If not, it is received in evidence.

(Document heretofore marked Respondent's Exhibit No. 6 for identification was received in evidence.)

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

The exhibit is the time card of Jack Munoz, is it not, Mr. Rosenthal?

MR. ROSENTHAL: Yes.

TRIAL EXAMINER: Very well.

Q (By Mr. Rosenthal) Tell us anything else you can remember about the telephone call that came from Mr. Cohen on the 10:26 on the morning of October 12th?

A Merely told me that he had contacted Mr. Rubinstein and Mr. Rubinstein had said that couldn't wait any longer and that they were pulling them out.

Q Did you say anything in reply?

A All I said was, "Nothing I could do about it."

Q Now, did you have any further conversation with Mr. [824] Cohen on October 12th?

A No further conversation with Mr. Cohen.

Q On October 12th?

A On October 12th.

Q Did you have a conversation with him on the following day, October 13th?

A Yes, he called up on the telephone.

Q That was the next time you spoke with him?

A That was the next time we spoke.

Q Let's go back to October 12th. At the time that the employees went out on strike, did you make any attempts to contact your brothers and your father?

A I was unable to contact one that was out of town.

Q That would be Arthur Derse, Junior?

A Arthur Derse, Junior.

Q Did you attempt to make any attempts to contact him?

A Only later I laid a note on his desk to call me if he got in at night or early in the morning, he should give me a call.

I put this on his desk. I didn't know whether he was coming back or not late at night or whether he would only be in the mornings, but I left a note anyway.

Q Did you subsequently speak with Arthur Derse, Junior, later in the day on October 12th?

A On October 12th late that night he called me and I told [825] him he had stopped at the plant late that night, and I told him what had happened, and he said that he saw something was wrong and I said that we would have to get together on Wednesday night, the four of us, and I would let them know just what had taken place.

Q On the 13th of October you received a telephone call from Mr. Cohen; is that correct?

A That's correct.

Q What did you—what time did you receive the call?

A Eleven twenty-five.

Q What did Mr. Cohen tell you at that time and what did you say to him?

A Well, Mr. Cohen asked me if we had made up our mind, and I said, "No, my brother had not as yet returned, that I couldn't talk to him, that we would get together that night and I could only answer him the next nights. That was the earliest I could tell him." That was the extent of the conversation.

He wanted me to again agree to recognition, and I said I just couldn't do it until a decision was made. We would get together that night.

* * * *

[827] Q Did Mr. Cohen or Mr. Hissam or any other union official offer to have you count or check their cards again?

A No.

Q On October 13th, on the evening of October 13th, rather, did you, in fact, have a meeting with your brothers and father regarding the union situation?

A Yes, we did.

Q Did you make any decision or did you come to any conclusion with regards to whether or not the union represented a majority of your employees?

MRS. MORIO: Mr. Trial Examiner, I object to the form of the question. Can I ask what happened at the meeting? He is asking what the final thing is.

TRIAL EXAMINER: Will you read the last question back, Mr. Reporter?

(Record read.)

[828] TRIAL EXAMINER: I think the question is proper, and you may answer it yes or no. Did you come to a decision?

THE WITNESS: As to whether we came to any decision—

TRIAL EXAMINER: Did you or did you not?

THE WITNESS: The only decision we came to was—

TRIAL EXAMINER: Just answer yes or not.

THE WITNESS: Yes.

TRIAL EXAMINER: All right. You may explain your answer now, if you destire to.

THE WITNESS: We came to a decision that we doubted this majority.

MR. GREEN: I object, why doesn't he testify what was said at this meeting?

MR. ROSENTHAL: That is perfectly all right with me.

MRS. MORIO: Let him say what happened.

Q (By Mr. Rosenthal) Mr. Derse, will you relate the conversation that you had with your father and brothers concerning your decision that you doubted that the union had a majority? Tell us what was said at this meeting.

A Well, we discussed the—and we doubted very much that Mr. Cohen had said that they had a majority.

Q Will you discuss the fact of how many employees—

MR. GREEN: I object, he is leading the witness.

TRIAL EXAMINER: Mr. Derse, so that we can get beyond [829] this hurdle, would you relate to us as nearly as you can remember a conversation of the individuals who were present at the meeting, and who said whatever that individual is supposed to have said.

Go ahead.

THE WITNESS: Well, in our discussion they said, "Well, how many fellows were out?"

Well, I said, "It looks to me like about ten or eleven, and we're thirty-four people. Dropping us four as officers we still have thirty."

Now, simple mathematics, eleven is not a majority of thirty, so we doubted it very, very much.

* * * *

[835] Q Let's go forward. When is the next time, after October 13th that you had any conversation with Mr. Cohen or Mr. Hissam or Mr. Rubinstein for that matter?

A October 25th.

Q Tell us about that conversation.

[836] A I was out to lunch. I drove back in to the parking lot, and as I got out of the car I heard my name mentioned and I stopped, and Mr. Hissam, Mr. Cohen, Mr. Rubinstein walked over to the car, told—called my name and I stopped.

Jack Rubinstein said, "I'm up in the area on some other matters, and I wonder if you made a decision."

I said, "I have no comment to make."

I pulled a slip out of my pocket and handed it to him with the name of Friedlander, Gaines and Ruttenberg, with the phone number, and told him he should contact our attorney.

TRIAL EXAMINER: Do you remember when that took place?

THE WITNESS: Around the 25th of October, around one-thirty.

Q Was there any other conversation between yourself and the union delegate?

A From that time on?

Q No, on October 25th.

A No, no.

Q Did they demand recognition again on that occasion?

A No, they asked whether I made up my mind.

Q They made no further clarification of what they meant?

A No, I just told them they have to contact our attorneys.

Q Did you have a conversation with Frank Tonkinson [837] shortly after this strike began?

MR. GREEN: I object, it is hearsay.

TRIAL EXAMINER: How could it possibly be hearsay if he just asked him the fact whether he had a conversation.

Go ahead and answer the question.

Overruled.

Q (By Mr. Rosenthal) Shortly after the strike began did you have a conversation with Frank Tonkinson?

A Yes, I did.

Q Can you tell me when the conversation took place?

A Came in for his pay, and I believe it was on October 20th—the second week, the 20th—he came in for his pay came in to the office and asked for his pay. He was there, he made some mention that—

MRS. MORIO: Objection, now the witness is testifying to hearsay, Mr. Examiner, and I move that unless he is going to have corroborating evidence he not be permitted to testify. It is clearly hearsay.

TRIAL EXAMINER: It seems to me that this evidence is gone into during General Counsel's case.

MRS. MORIO: By the respondents, Mr. Trial Examiner. He made Mr. Tonkinson his witness. He asked him on direct—on cross-examination questions which were

not put to him on direct, and Mr. Tonkinson answered that he had no conversation with Mr. Derse.

[838] MR. ROSENTHAL: What?

MRS. MORIO: If Mr. Rosenthal wants to impeach Mr. Tonkinson who became his own witness that is what he is doing.

TRIAL EXAMINER: I will allow the question.

MR. ROSENTHAL: You better read the record.

MRS. MORIO: I did. You thought he testified, but he didn't.

Q (By Mr. Rosenthal) What did he say on that occasion?

A I gave him his envelope. He said to me—I didn't question him. He offered this information. He would have liked to come back to work, that he did not go out of his own accord. He did not know anything about this, but he was afraid. He only owned one car, and he and his wife—his wife needed that car to go to work, and he was not going to take any chances. He was afraid of damage to his automobile.

TRIAL EXAMINER: What date was that?

THE WITNESS: On the 20th, I believe the 20th that he came for his pay.

TRIAL EXAMINER: Of October?

THE WITNESS: Of October, yes.

Q Could it have been before the 20th?

A Well, to only other day that it could have been if he came in on pay day, sometimes these fellows, when they [839] were not around on pay day they would come on a Thursday or Friday or Monday and collect the pay for the previous week.

Q Did he come in on a regular pay day?

A I'd say so, I would say he came either on the 20th or— I doubt whether it was the 13th or not.

Q Could you say that it was either one of those two days?

A Yes, one of those two days, yes.

Q All right.

A All I told him the door was open, it was up to them.

TRIAL EXAMINER: Mr. Derse—

THE WITNESS: Yes.

TRIAL EXAMINER: —between the time Mr. Cohen —I think it was Mr. Cohen you handed the name of your attorneys to?

THE WITNESS: Yes.

TRIAL EXAMINER: Between the time on Wednesday night when you met with your brothers to decide what position to take and the time you spoke to Mr. Cohen as he was going into the plants and handed him the cards of your lawyers, had you made or had the respondents made or had any communication with the union during that period at all?

THE WITNESS: No, none at all.

TRIAL EXAMINER: All right.

[840] MR. ROSENTHAL: That is all.

Q (By Mr. Rosenthal) Maybe we better clarify that. Do you know whether your attorneys had any contacts with the union during that time, of your own personal knowledge?

A No, I don't know. I have no knowledge of that at all.

TRIAL EXAMINER: As far as you were concerned, neither you nor your brothers had any communication during that period?

THE WITNESS: I had no knowledge whatsoever.

* * * *

TRIAL EXAMINER: On the record.

(Thereupon, items referred to were marked Respondent's Exhibit No. 7 for identification)

MR. ROSENTHAL: The reporter has marked for identification what appears to be a galvanized roofing nail as respondent's Exhibit 7.

Q Mr. Derse, I show you Respondent's Exhibit 7 and I ask you if you can identify not—first, this specific nail, if it was one of a group, tell us the one of a group.

[841] A It is one of a group, yes.

Q Tell us how many of these roofing nails, approximately, are in this group first.

A Approximately four pounds.

Q Can you tell us approximately how many individual nails would be in four pounds?

A I could not tell you.

Q Did you weigh the group?

A I weighed the box, the group, yes.

Q Tell us, if you please, when was it that you saw these for the first time and where you saw them?

A I saw those roofing nails for the first time. I was called up at my home prior to eight o'clock on November 4th, I believe.

MR. GREEN: Eight o'clock when, a.m. or pm.?

THE WITNESS: November 4th, prior to eight o'clock.

Q A.M. or P.M.

A A.M.

Q Who called you first?

A Harold Lauer called me, because he got in about ten to eight.

Q You got to the plants?

A There were nails all around.

I said, "Leave them right where they are, I'll be right down."

[842] I came down as soon as I saw it I called the police department. This is right on record with the Port Jervis Police Department.

Q Where were the nails?

A The nails were strewn in front of the building, in the parking lot area in front of the building, they were strewn all along the west side of the building, they were strewn where a loading dock was for shipping, they were in the back of the building and they were along the alley adjacent to the railway.

Q How about the driveway as you enter the parking lots?

A The driveway to the parking lot had some in, but they were basically where you would park cars.

Q You say also you found them around the loading docks?

A They were at the loading docks, receiving and shipping both.

TRIAL EXAMINER: What date was this?

THE WITNESS: November the 4th. If I could refer to my notes—

Q Go ahead, if you have any notes that would help you.

A Yes.

November 5th, this is on the 5th of November, on the police blotter.

TRIAL EXAMINER: Very well.

MR. ROSENTHAL: I move that respondent's Exhibit No. 7 [843] be accepted into evidence.

MR. GREEN: I object. Can we have voir dire?

TRIAL EXAMINER: Yes.

VOIR DIRE EXAMINATION

Q (By Mr. Green) Mr. Derse, do you know the names of those individuals who put these nails on your parking lots?

A Do I know who put them there?

Q Yes.

A No, that I couldn't tell you.

Q Did you give any names to the police?

A No, I did not.

Q Did the police ever arrest anybody for this?

A What was that?

A Did the police ever arrest anybody for this?

TRIAL EXAMINER: He means putting nails?

Q Did they ever arrest anybody for putting nails?

A Not to my knowledge.

• • • •

[846] TRIAL EXAMINER: Just a minute, would you let me finish.

I have the problem of determining whether or not this company acted in good faith when it refused to recognize the union, and I suppose that anything which reflects upon how the company came to its conclusion that the union did not represent an uncoerced majority would be material to making up state of the employer's mind, and I consider from this evidence, whatever the probative weight may be, is material in that aspect.

In that light I overrule your objection and admit Respondent's Exhibit 7.

[848] Q (By Mr. Rosenthal) Mr. Derse, a short time following this incident with the nails do you recall any other incident involving automobiles?

A Yes. On November 13th we were working several nights a week, and because of this previous incident, we suggested that all the cars of those people working at night be parked directly in front of the building.

Mr. Swingle, Mr. Lauer, were among these employees who were working, and I personally went out just prior to quarter to nine, which was our normal quitting time when working late and I took one look at two of these cars and two of them had flat tires, Mr. Swingle and Mr. Lauer.

I personally stood there while they changed them, and we found icepick had been driven through these tires.

Q Was—

MR. GREEN: I object.

A Right through the wall of the tire.

I told them to take the tires down and have them fixed, that we would pay for them.

[849] MRS. MORIO: Let me object to the whole line of questioning on the grounds that it is hearsay unless the witnesses to whom this happened are brought in as corroborating witnesses and unless Mr. Derse can testify to the facts that he was present and he saw who did this.

TRIAL EXAMINER: You may have a running objection to this line of questioning. Objection is overruled.

Go ahead.

Q (By Mr. Rosenthal) Now, Mr. Derse, was this incident reported to the police? To your knowledge?

A To my knowledge, no. This one I did not report. I had—a report is one thing. We had a police car there every day at opening, at twelve o'clock, at twelve forty-five. At five, at six o'clock at a quarter to nine.

Now, I didn't call the police station, I mentioned it to them. Whether he made a report out of it, that I cannot tell you.

[870] CROSS-EXAMINATION

• • • •

[917] Q Is that your answer anyway, Mr. Derse, your brother was back that evening on October 12th, wasn't he, Arthur Derse, Junior?

A That's right.

Q And you talked to him?

A That's right.

Q And he said—at the plant and you saw something was wrong?

A I was at the plants?

Q No, that your brother was at the plants?

A He stopped at the plants.

Q Right, and he saw that something was wrong?

[918] A That's right.

Q What time was that?

MR. ROSENTHAL: Objection, that's asking the witness what time his brother—

MR. GREEN: I asked him what time the call was.

TRIAL EXAMINER: What are you asking the witness now?

MR. GREEN: What time his brother called him.

MR. ROSENTHAL: I withdraw my objection.

TRIAL EXAMINER: What time did your brother call you on the night of October 12th?

THE WITNESS: I'd say between eight and nine o'clock at night.

TRIAL EXAMINER: Was it a phone conversation?

THE WITNESS: Yes.

TRIAL EXAMINER: Go ahead, Mr. Green.

Q He said he had already been at the plants; is that right?

A He was at the plant.

Q I take it you talked to your brother, you told him what the story was?

A Yes.

Q You told him there was picketing?

A I didn't go into detail.

Q All right.

TRIAL EXAMINER: I would like to know precisely what [919] you said to your brother on the phone. Would you tell us that?

THE WITNESS: I said he probably noticed that there was difficulty.

He said, "Yes, I saw something was wrong."

I said, "We have a strike." I said, "We are going to get together tomorrow night to discuss this," I says, "because I said I could give an answer—I couldn't give an answer, the earliest was Thursday," and as I testified yesterday we cannot discuss these things during the day because we do not have a soundproof office.

TRIAL EXAMINER: I would like to ask you this question. Did you between the time that Mr. Cohen came in and indicated to you that some employees had joined the union and your meeting on Wednesday night, did you during that period retain an attorney or not?

THE WITNESS: I called our attorney in Port Jervis who had handled all of our affairs, and I told him briefly what had happened. I called him on the 12th. It was a holiday. I had to go around to find him. I got him and he told me that this was something, this attorney told me that it was something that was out of his field, that it was a specialized field and that he could not handle it and that we should retain a law firm that was in a position to handle an item of this nature.

[920] HEARING OFFICER: Did you contact that law firm before Wednesday night?

THE WITNESS: No. We didn't—frankly, we didn't know where to start, see.

TRIAL EXAMINER: In other words, the decisions that you made on Wednesday night amongst the family in regard to this problem were decisions made without the advice of counsel; is that right?

THE WITNESS: The decisions we made Wednesday night?

TRIAL EXAMINER: Yes. Were decisions made without the advice of counsel?

THE WITNESS: Without the advice of counsel, yes.

TRIAL EXAMINER: Very well, go ahead, Mr. Green.

Q (By Mr. Green) On October 12th then Arthur Derse, Junior, Robert Derse, your father, they were all in Port Jervis?

A We was in Port Jervis.

Q You had already talked to them?

A I had talked to Robert and I had talked to father.

Q And you talked at some length—at least some length with your brother, Arthur, Junior?

A Late at night.

Q On October 13th Mr. Cohen from the union called you again, did he not?

A That's right.

[921] Q Why don't you tell me what he told you and what you told him?

A He just asked me whether we had made a decision and I said in my testimony you will notice that I said he had not returned.

Q In other words, you were lying to Mr. Cohen?

A I wouldn't say so, no.

Q You told him your brother hadn't returned and he had returned?

A I can't tell you what time he came into the office that day, I don't know.

Q He was in Port Jervis on October 12th, I believe that was your testimony.

• • • •

[923] Q No, I asked if anybody came to you and said they threatened me.

MR. ROSENTHAL: Objection.

A No, I testified nobody at the picket line.

Q Did Hughson ever come to you and tell you that he had been threatened?

A Hugdson did not tell me.

• • • •

[924] Q (By Mr. Green) Mr. Derse, did you tell Mr. Cohen on October 13th that the reason you could not respond to him was because your brother was still away?

A I said he hadn't returned.

Q On the 12th, didn't you tell Mr. Cohen that the reasons you could not respond was because it was a corporation decision and your brother was away?

A That's right.

• • • •

[939] REDIRECT EXAMINATION

• • • •

[951] Q Mr. Derse, on the evening of the 13th when you met with your family, your brothers and your father in particular—

A Yes.

Q —was a discussion held at that time about retaining attorneys to represent the firm?

A Yes.

Q Now, you said that on the 12th you contacted the general corporate attorney in Port Jervis?

A That's correct.

Q Did he give you any advice or did he tell you to do anything?

A He said that we should retain an attorney who was familiar with this matter, this part of the law.

Q Did he tell you anything else, did he give you any instructions?

A He told me that until we retain counsel we should make no further comment or do anything about this but just go and seek a competent attorney.

Q Fine.

On the 13th you say—was there a decision made among the executives to retain a labor specialist at the time?

[952] A Yes, the decision was made to retain a labor specialist.

Q What did you do following the meeting of October 13th to obtain an attorney, what steps did you take?

A Well, first I picked up the New York telephone book, the Red Book, and after I looked I put it right back on the shelf, because there's thousands of names in it and it would be impossible to select it.

Q Then what?

A Then I contacted—

Q When did you do this, by the way?
A On Thursday.
Q All right.
A I proceeded to contact—my business associates, members of the Rotary Club, to find out if I could get a recommendation, and I went to the vice president of the County National Bank whom we work closely with on matters, and he suggested I contact another member of the Rotary, and I said to him well, I wish you would probably intercede for me in this, if you will, and he said yes, I will try to get him.

We had another recommendation of another attorney, and finally on, I believe it was on Sunday that this party called me who the vice president of the County National Bank recommended and told me who his attorneys had been and recommended them very highly and suggested that I immediately make a contact. I said, would you please make [953] this contact for me, because you can have an introduction. He knows who I am, so he made that contact on Monday and I immediately called the firm of Fridlander, Gaines and Ruttenberg. We set up a date for Tuesday, and I went down to see Mr. Gaines, this was the 19th, I went to New York—

* * * *

GC 2A

WILLIAM POLLOCK
General President

JOHN CHUPKA
General Sec'y-Treas.

TEXTILE WORKERS UNION OF AMERICA

[TWUA Emblem]

99 University Place, New York, N. Y. 10003
OREgon 3-1400

November 3, 1965

Mr. Arthur F. Derse, Sr., Pres.
Wilder Mfg. Co., Inc.
Mechanic St. & Erie RR
Port Jervis, New York

Dear Mr. Derse:

Because of my inability to arrange a conference for the purpose of receiving recognition and entering into collective bargaining with your company which represents the majority of your employees, proof of which has been presented to you, I have found it necessary, at this time, to bring charges against your company for refusal to recognize the union's majority position in the plant.

Likewise I called the legal firm whose address you gave us, namely Friedlander, Gaines & Ruttenberg, 221 W. 57 Street, and spoke to Mr. Ruttenberg. I was unable to get any positive commitment from him regarding our union's recognition or as to any positive statement as to your company's willingness to sit down and meet with the union.

The company's failure to act in accordance with the provisions of the law which requires the company to recognize the union representing the majority of the com-

pany's employees leaves the union with no other recourse but to proceed with the charges as filed.

Very truly yours,

JACK RUBENSTEIN
New York State Director

JR:mb

Encl.

cc: W. Hissam
NLRB, Mr. I. McLeod

S. Cohen
Legal Department

GC 2B

WILLIAM POLLOCK
General President

JOHN CHUPKA
General Sec'y-Treas.

TEXTILE WORKERS UNION OF AMERICA

[TWUA Emblem]

99 University Place, New York, N. Y. 10003
ORegon 3-1400

November 5, 1965

Mr. Arthur Derse, Sr., Pres.
Wilder Mfg. Co.
Mechanic Street & Erie RR
Port Jervis, New York

Dear Mr. Derse:

On November 3 I sent you a letter and a copy of charges filed with the National Labor Relations Board as a result of your failure and refusal to sit down and negotiate a collective bargaining agreement with our union as the representatives of the company's employees.

Inasmuch as I note that I did not reduce to writing my request to represent all production and maintenance employees excluding all supervision and office clerical employees, I am now restating this for the written records. I have received copies of the letters you sent to employees who are out on strike. This, in our opinion, is a continuation of the company's unfair labor practice along with its refusal to bargain with the union.

The union is considering these letters demanding the return of the workers to work by November 4 as a form

of harassment. We will of necessity add this material to our charges against the company.

Very truly yours,

JACK RUBENSTEIN
New York State Director

JR:mb

cc: S. Cohen
W. Hissam
NLRB—I. McLeod

Reg.-RRR

GC 2C

January 6, 1965

Mr. Walter H. Derse
Wilder's Manufacturing Co.
Port Jervis, New York

Dear Mr. Derse:

Copies of your letters of December 30, 1965 and January 4, 1966 have been received by the writer through some of your employees who were good enough to forward them to me.

Assuming that the questions you raise in your letters to your employees have an element of merit or are completely true, the workers still have a right to pick a collective bargaining agency to represent them. That is the law. Irrespective of whether your arguments have merit, it should be quite obvious that the company's employees see this somewhat differently than you do.

Despite your offer that the plant is open for the workers to voluntarily return to work, the fact is that they are willing to stand a great deal of privation to convince you that they desire to be represented by the union.

Many of your workers feel that they have not been treated as well as your letters indicate. They may or may not be correct in this feeling but they certainly have the right to give expression to it through joining their union, and you as a law abiding employer should make an effort to sit down with the chosen representative in an effort to come to terms.

Your constant repetitious referrals to strangers and outsiders does not help to solve the problem. As a matter of law we are not strangers or outsiders. We happen to be the representatives of the company's employees as fully as the attorneys employed by the company to represent it in this case.

You seem to think that the workers did not understand your first letter of December 30 inviting them to come

back without the union and, therefore, felt called upon to send another letter on January 4 in which you repeated your company's offer for them to return to work and settle the present problems.

As far as the majority of your employees are concerned when the strike took place, there can be no real settlement unless you sit down with the collective bargaining agency picked by the workers to represent them.

Being an optimistic man by nature, I again wish to reiterate the sentiments expressed in my letter to you of December 27. That is, the union wishes to avoid the continuation of all quarrels with the company and we again invite the company to sit down with the union to the end that we work out a satisfactory agreement between the parties.

Very truly yours,

JACK RUBENSTEIN
New York State Director

JR:mb

cc: W. Hissam
S. Cohen
Union-Gazette Newspaper, Pt. Jervis, N.Y.
The Times Record-Middloetown, N.Y.

GC 2D

December 27, 1965

Mr. Arthur F. Derse
Wilder Manufacturing Co.
Port Jervis, New York

Dear Sir:

I have just received notice from the Labor Board regarding a meeting called for at the New York office for the purpose of considering an election which will be held on December 30 at the Board office. This union is prepared to enter into an election agreement. Yet, I feel what is needed is for the parties to get past these preliminaries, if it is at all possible.

I thought it might serve a useful purpose addressing a letter to you in the spirit of the Christmas season and in the hopes of starting the New Year on the right footing.

As you know, as a result of our union's request that you recognize it as the collective bargaining agent and your failure to respond by recognizing the union, our union called a strike in your company's plant.

There can be doubt that we represented the majority of your employees at the time, have continued to, despite the long duration of the controversy.

The union has no quarrel with the company preferring to operate without a union contract; however, once the union establishes a majority it is our opinion that the best results would be arrived at by recognizing the reality of the situation and seeing if the parties could work out a reasonable collective bargaining arrangement between them.

In the spirit of starting the New Year on the right footing, it is our union's proposal that the company again consider the question of recognizing the union, settling a number of immediate questions, and then proceeding

on a more leisurely basis to sit down and negotiate a collective bargaining agreement between the parties. The union, therefore, requests that the company reconsider its position and proceed forthwith to recognize the union. It is the writer's opinion that if this meets with the company's thinking, we could have the matter reasonably settled even before the first of the year or shortly thereafter.

Let me assure you that this union is not interested in continuing any animosities which can be reasonably and satisfactorily settled and it is in the spirit of this suggestion that I make these proposals. If this meets with your company's thinking, I would appreciate that either you or the company's lawyers phone me directly and I will be most happy to arrange for an early conference to see that the matters in controversy can be settled.

Trusting that you will give the suggestions in this letter your favorable consideration, I await your reply.

Very truly yours,

JACK RUBENSTEIN
New York State Director

JR:mb

cc: W. Hissam
S. Cohen

GC 4A

TEXTILE WORKERS UNION OF AMERICA

Affiliate of the AFL-CIO and CLC

(DATE) Oct. 11, 1965

I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said Textile Workers Union of America as my representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

MILL Wilders Mfg.

DEPARTMENT ..... SHIFT .....

NAME Jack Munoz
(Do not print)

ST. AND NO. R.D. #2

CITY Port Jervis, N. Y.

W.L.H.
(Received by)

HOME PHONE NO. 856-3898

GC 5

10/11/65 Feb. 1, 1966

Upon asking employer for recognition, and upon his refusal there is a motion among the people present to go on strike.

Motioned by Mike Molloy.

Seconded by Jack Munoz and agreed upon by the following:

/s/ Joseph Munoz

/s/ Charles L. Shaw

/s/ Harold D. Vandermark

/s/ Arthur J. O'Hara

/s/ Harmon B. Masker

/s/ James E. Stempert

/s/ Dominick Caliciotti

/s/ James Ehre

/s/ Jack Munoz

/s/ Frederick J. Hicks

/s/ Michael J. Molloy

Jack:

This is motion made at my house on Oct. 11, 1965 at Wilder Mfg. Co. employee meeting.

SUPREME COURT OF THE UNITED STATES

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ORDER ALLOWING CERTIORARI—Filed April 22, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 73-1234 and a total of one hour is allotted for oral argument.

190

SUPREME COURT OF THE UNITED STATES

No. 73-1234

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUCK DRIVERS UNION LOCAL NO. 413, ET AL.

ORDER ALLOWING CERTIORARI—Filed April 22, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 73-1231 and a total of one hour is allotted for oral argument.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 552083 294

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1231 & 73-1234

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
AND
TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRUCK DRIVERS UNION LOCAL NO. 413, AND TEXTILE WORKERS UNION,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION FOR THE UNION RESPONDENTS

The opinions below, the basis of this Court's jurisdiction, and the statutory provisions involved are set out at pp. 2-3, A1-A92 of the petition in No. 73-1231 (filed by Linden

Lumber Division), and at pp. 1-4, 23-193 of the petition in No. 73-1234 (filed by the NLRB).[1]

QUESTION PRESENTED

Sections 8(a)(5) & 9(a) of the National Labor Relations Act provide that it is an unfair labor practice for an employer to refuse to recognize "the representative • • • designated or selected • • • by the majority of the employees in a[n] • • • appropriate • • • unit." The question raised in the petitions is:

Whether an employer who has not committed substantial violations of §§ 8(a)(1)-(4) of the NLRA has an absolute privilege to refuse to recognize a union, and an absolute right to require that union to prove its majority status by petitioning for a Board election and certification, no matter how convincing the union's showing of majority support may be.

ARGUMENT[2]

1. The petitions in these cases do *not* "present a question

[1] Since they raised the same question in essentially parallel settings, the Court of Appeals consolidated two petitions for review of separate Board decisions, one filed by Truck Drivers Union Local No. 413 and involving Linden Lumber Division, the other filed by the Textile Workers Union and involving the Wilder Mfg. Co. (NLRB Pet. App. p. 24.) Both petitions for certiorari seek review of the resulting decision of the court below. We therefore respond to both in this brief.

[2] Since, as we show below, the Court of Appeals did not determine when an employer must recognize an uncertified union, but simply held that the privilege not to do so is not absolute, the question presented here is wholly abstract. For this reason and since the Board's statement of the case (NLRB Pet. pp. 4-11) follows the outline of the facts as stated in its decisions (which the Unions accepted in the court below), we do not restate the case.

which was left open in [*NLRB*] v. *Gissel Packing Co.*, 395 U.S. 575," (cf. NLRB Pet. p. 11); they present a question which was foreclosed by Congress in enacting the 1947 amendments to the National Labor Relations Act. The Court of Appeals' answer to that question is the one decreed by Congress, and there are no conflicting decisions in this Court or in the other courts of appeals. Additionally, the decision below is interlocutory in nature. It imposes no present obligation on either Linden Lumber (the petitioner in No. 73-1231), or Wilder Mfg. Co. (the other employer party before the Board, which has not filed a petition). Nor does that decision disturb the Board's prerogative to determine in the first instance the respective rights and obligations of the employer and union parties. For, the Court of Appeals only ordered a "remand to the Board to reconsider what option, consistent with the statute, it wishes to follow," (NLRB Pet. App. p. 50). Thus, these immediate petitions for further review by this Court prior to that process of reconsideration are both insubstantial and premature.

2. Two issues of law were presented to the court below. First, whether the Board's " 'voluntarist' view of the duty to bargain, [*viz*, that] absent unfair labor practices or an agreement to determine majority status through means other than an election, such as a poll, the employer has no duty to recognize the union," (NLRB Pet. App. p. 35), is correct. Second, if not, under what circumstances an employer violates the Act by refusing recognition and requiring the union to prove its majority status by petitioning for a Board election and certification. The Court of Appeals rejected the Board's "voluntarist view of the duty to bar-

gain," but declined to pass on the second and ultimate question until it had been addressed by the Board in light of the policy of the Act as Congress wrote it, rather than evaded by that agency's determination to effectuate its own notions of sound policy. (See NLRB Pet. App. pp. 36-37, 47, 50.)

(a). Rejection of the Board's "voluntarist view of the duty to bargain" is required by the language of §§ 8(a)(5) & 9(a) as informed by the legislative history which explains the place of these provisions in the overall statutory scheme.

Section 8(a)(5) of the Act, provides:

> "It shall be an unfair labor practice for an employer * * * to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Section 9(a), in turn, states:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *"

Thus, the Act as it stands today, in precisely the language utilized by the Wagner Act before it, imposes a duty on employers to recognize "the representative * * * designated or selected * * * by the majority of the employees in a[n] * * * appropriate * * * unit." Since Congress has not

> "specif[ied] precisely how that representative is to be chosen, it was early recognized that an employer

> had a duty to bargain whenever the union representative presented 'convincing evidence of majority support.' Almost from inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation." (*NLRB* v. *Gissel Packing*, 395 U.S. 575, 598.)

In 1947, the Taft-Hartley Conference Committee considered ,and rejected, a proposal which had passed the House, and which would have limited § 8(a)(5) to situations in which "an employer had failed to bargain with a union 'currently recognized by the employer or certified as such [through an election] under section 9.' Section 8(a)(5) of H.R. 3020, 80th Cong., 1st Sess. (1947)," (*Gissel*, 395 U.S. at 598. The Conference Committee explained that:

> "The conference agreement * * * follows the provisions of existing law * * * in the case of section 8(5) * * * which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)." (H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong. 1st Sess. p. 41, 1 Leg. Hist. of the LMRA, p. 545.)

And, as this Court appreciated in *Gissel* (see 395 U.S. at 598), the then "existing [§ 8(a)(5)] law * * * follow[ed]" by Congress in 1947 was that which had been stated by Judge Charles Clark in the leading case of *NLRB* v. *Dahlstrom Metallic Door Co.*, 112 F.2d 756, 757 (C.A. 2):

> "The contention that bargaining was not mandatory until the Board had accredited Local 307 as bargaining agent is frivolous. An employer is under a duty to bargain as soon as the union representative presents

> convincing evidence of majority support. *National Labor Relations Board* v. *Remington Rand, Inc.*, 2 Cir., 94 F.2d 862, 868, certiorari denied 304 U.S. 575, 585. We do not mean that respondent had to bargain with anyone claiming to represent a majority, but adequate proof tendered by the claimant could not in good faith be ignored."

Finally, to further underline the point that Board elections are a means for resolving "bona fide disputes as to the existence of the required majority," (*Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 69), and not as the House would have provided, an end in themselves, the 1947 Congress added § 9(c)(1)(B) to the Act which provides employers a narrower right than they sought, *viz*, to file their own petition for a representation election where they "have *reasonable grounds* for believing that labor organizations claiming to represent the employees are really not the choice of the majority," (S. Rep. No. 105, 80th Cong., 1st Sess., 10-11; 1 Leg. Hist. of the LMRA, p. 416; emphasis added).

What Congress did and did not do in 1947 thus leaves no room for the petitioners' argument that there is an employer privilege to refuse recognition and to require the union to prove its majority status by petitioning for a Board election and certification where the union has presented "convincing evidence of majority support," (*Dahlstrom Metallic Door*, 112 F.2d at 757). For while employers sought a limitation of the duty to bargain which would have required unions to petition for an election no matter how strong the union's proof of majority, they were "unable to secure its embodiment in enacted law," (*Local 1976 Carpenters* v. *NLRB*, 357 U.S. 93, 100). And while the present

Board shares the belief that according employers such a limitation is sound policy, the contrary "policy of Congress * * * that we find * * * in the statute * * * cannot be defeated by the Board's policy," (*Local 1424 Machinists* v. *NLRB*, 362 U.S. 411, 428).

(b). In *Gissel* this Court squarely recognized that Congress had foreclosed the question the petitions seek to raise by stating:

> "[W]e hold that the 1947 amendments did not restrict an employer's duty to bargain under § 8(a)(5) solely to those unions whose representative status is certified after a Board election." (395 U.S. at 600; footnote omitted.)

But as the Court of Appeals recognized, while:

> "These statutory provisions [§§ 8(a)(5), 9(a) & 9(c)(1)(B)] plainly contemplate employer duty of recognition even in the absence of election, and give a safeguard to the employer who has doubts about majority status by assuring him the right to file his own petition for an election [, t]here is no clear cut answer * * * either in the text of the statute or the legislative history, to the question of when and in what circumstances an employer must take evidence of majority support as 'convincing.'" (NLRB Pet. App. p. 37.)

It is precisely because the court below did not attempt to provide a definitive answer "to the question of when and in what circumstances an employer must take evidence of majority as 'convincing'," that this case does not, as the Board claims, present the question reserved in *Gissel*. That reserved question was whether a union has a "right to rely on cards as a freely interchangeable substitute for

elections where there has been no election interference," (395 U.S. at 601 n. 18). This reservation was the product, and reflected limited acceptance, of a background of scholarly comment (see *id.* at 602 n. 19), and court of appeals' decisions (see *id.* at 602-610), which raised substantial, albeit sometimes overstated (*id.* at 602), grounds for regarding authorization cards, *standing alone*, as less than perfectly reliable indications of majority support.

The focus of this Court's attention in *Gissel* was not on the full extent of the obligations created by § 8(a)(5) standing alone, but on a remedial question concerning the scope of § 10(c), *viz*, "the appropriateness of a bargaining order as a response to violations of § 8(a)(5) as well as §§ 8(a)(1) and (3)," (395 U.S. at 595). In contrast the question of whether as a matter of substantive § 8(a)(5) law employers have a duty to recognize a union which presents authorization cards is one aspect of the entirely distinct problem of identifying the "indicators of employee desires," (*id.* at 601), which have proved in the light of evolving practical experience to be sufficiently reliable so as to serve as a proper predicate for a bargaining relationship, and those which have proved to be unreliable. The present cases, which do not involve authorization cards standing alone, but rather authorization cards backed by recognitional strikes by the card signers, present another aspect of that problem.

Following this Court's lead in *Gissel*, the court below concluded that this issue, in all its ramifications, should be dealt with in the first instance by the Board. For, in contrast to the threshold question that court did answer, this question is intensely practical and has not been dealt with

in terms by Congress. The Court of Appeals, therefore, refused the bargaining orders the Unions had sought, and instead ordered a "remand to the Board to reconsider what options consistent with the statute it wishes to follow," (NLRB Pet. App. p. 50). Until the Board complies with that mandate the process of litigating elucidation which this Court set in motion in *Gissel* cannot even begin. Thus, at this time, as at the time *Gissel* was decided, the question left open in that case is not ripe for decision.[3]

---

[3] Despite the holding of *Gissel*, stated at 395 U.S. at 600 and quoted above, which affirms our understanding of the force of the 1947 amendments, the Board seeks to create the impression that the question reserved in *Gissel* was "whether a bargaining order based on cards *or some other showing of employee support other than certification in a Board election* 'is ever appropriate in cases where there is no interference with the election processes' [395 U.S.] at 595, see also *id.* at 601, n. 18," (NLRB Pet. App. p. 12; emphasis added.) The italicized portion of the foregoing finds no basis in this Court's language in n. 18 of *Gissel*, the pertinent portion of which we set out in the text. And the Board has taken out of context what this Court did say at 395 U.S. at 595. The quoted phrase in the petition is part of the paragraph concluding a discussion in which the Court stated that it put "aside * * * the Union's arguments * * * [that the] right to rely on cards * * * should be * * * correspondingly more expanded than the Board would have us rule * * *," in order to consider "the points of difference between the employers and the Board," *viz*, whether authorization cards alone can support a bargaining order where the employer has committed substantial violations of §§ 8(a)(1)-(4). (*Id.* at 594-595.) When that portion of the opinion is read in full and against the background of the passages at 395 U.S. at 600 & 601, n. 18, there can be no doubt that this Court did not intend to reopen the question that Congress had decided in 1947, but only to leave open that which the legislature (and the court below) have left open.

CONCLUSION

For the above stated reasons, the petitions for a writ of certiorari should be denied.

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No opposition to the petition for a writ of certiorari was submitted by the National Labor Relations Board.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

AND

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO RESPONDENT UNION'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT UNION'S BRIEF IN OPPOSITION

In the instant case the National Labor Relations Board unequivocally held that an employer "should not be found guilty of a violation of Section 8(a)(5) [of the National Labor Relations Act] solely on the basis of its refusal to accept evidence of majority status other than the results of a Board election." (Pet. App. C, p. A41) Equally unequivocally, the Court of Appeals held that "[t]he position adopted by the Board

is inconsistent with the Act and its orders must be reversed." Pet. App. A, p. A26. Notwithstanding these diametrically contrary positions, and the Board's own attack on the Court of Appeals' decision in its companion petition for certiorari in No. 73-1234,[1] the Union contends in opposition that (1) Supreme Court review is "premature" (Union Br., p. 3) inasmuch as the Appellate Court remanded this case to the Board for further consideration; and that, in any event, (2) the question presented is one which, rather than left undecided by this Court in *N. L. R. B.* v. *Gissel Packing Company*, 395 U. S. 575 (1969), was previously "foreclosed by Congress" in the Act itself. Union Br., p. 3.

Both of these contentions are erroneous and fail to in any way mitigate the need for this Court to address itself to the serious dislocation in national labor policy caused by the decision of the lower court.

1. The Board has properly refused to accept the Court of Appeals' remand. Remand would serve no useful purpose for the Board has carefully considered and articulated its views, and the lower court has squarely rejected them. This is not a case, therefore, where a remand is required "due to the Board's lack of articulated reasons" for its decision (*N. L. R. B.* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 442 (1965)), nor one requiring remand because ". . . the Court of Appeals did not pass upon the merits of the Board's petition for enforcement" (*N. L. R. B.* v. *Raytheon Co.*, 398 U. S. 25, 29 (1970)), nor even, as the Union concedes (Union Br., p. 3), one raising questions other than "issues of law not calling for examination or appraisal of evidence" (*Kiefer-Stewart Co.* v. *Seagram and Sons*, 340 U. S. 211, 214 (1951)). Rather, the lower court simply remanded this case to the Board to

1. The Board's Petition is styled *"National Labor Relations Board* v. *Truck Drivers Union Local No. 413, and Textile Workers Union"*, No. 73-1234. Linden Lumber Division, Summer & Co., fully supports the Board's petition and respectfully prays that it be granted and that the subject petition be consolidated therewith.

proceed within a specific legal framework, the parameters of which are wholly unacceptable to the Board as indicated by its petition in No. 73-1234. Cf. *Food Store Employees* v. *N. L. R. B.*, 476 F. 2d 546 (D. C. Cir. 1973), *cert. granted*, Dec. 3, 1973, No. 73-370. Remand in these circumstances, it is submitted, would serve no purpose and only further delay resolution of this case in which, as the lower court itself observed, "[t]he time elapsed since the underlying events . . . is [already] more than six years." Pet. App. A, p. A8.

2. The Union's contention (Br., pp. 2-3) that "the petitions in these cases do not "present a question which was left open in [*N. L. R. B.*] v. *Gissel Packing Co.*" but, instead, only "a question which was foreclosed by Congress in enacting the 1947 amendments to the National Labor Relations Act" is specious. The Union's arguments (Br., pp. 4-9) are precisely the same as those which were urged, but expressly left undecided and placed "aside", in *Gissel*. 395 U. S. at 594-5. Moreover, as both Linden (Pet., pp. 8-10) and the Board (Pet., pp. 12-20) demonstrate in their petitions, the Union errs in its assertion that, as a result of the Taft-Hartley amendments to the Act, an employer who does not engage in election interference may still be required to bargain with a union claiming an authorization card majority. To the contrary, as *Gissel* recognized (395 U. S. at 600), "the policies reflected in [the amendments] . . . fully support the Board's present administration of the Act . . . an employer [who does not engage in contemporaneous unfair labor practices] can insist on a secret ballot election . . ." A card-based bargaining order is warranted only where either a fair election has been rendered impossible or where, as contemplated by *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U. S. 62, 68-69 (1956), the employer has voluntarily "satisf[ied] itself as to the union's majority status."

CONCLUSION.

For the reasons stated above, as well as for the reasons set forth in the petition, it is respectfully prayed that the petition be granted for the subject case.

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IN THE

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Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the

Rules of this Court for leave to file the attached brief *amicus curiae* on behalf of the petitioners in these cases.

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters in this Court vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.*

3. The question presented in the instant cases — whether an employer, who has not interfered with the National Labor Relations Board's representation election process, may be required to bargain with a union asserting that it is the representative of a majority of the employer's employees where the union's majority status has not been established through the Board's election

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* E.g., *Corning Glass Works* v. *Brennan*, No. 73-29; *Geduldig* v. *Aiello*, No. 73-640; *William E. Arnold* v. *Carpenters*, No. 73-466; *Howard Johnson Company, Inc.* v. *Detroit Joint Executive Board, Hotel and Restaurant Employers and Bartenders International Union, AFL-CIO*, No. 73-631; *Gateway Coal Company* v. *United Mineworkers of America, et al.*, —— U.S. (No. 72-782, Jan. 1974); *Super Tire Engineering Company* v. *Lloyd W. McCorkle, et al.*, No. 72-1554; *Marco DeFunis* v. *Odegaard*, No. 73-235; *N.L.R.B.* v. *Bell Aerospace Company Division of Textron, Inc.* No. 72-1598; *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952 (1973); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 517 (1971).

processes—is a matter of significant concern not only to the Chamber's membership but also for the administration of the National Labor Relations Act generally. The Board and the court below have reached far different conclusions with respect to the obligation of an employer who is confronted with a union demand for recognition. The resolution of the instant question is, therefore, one which will significantly determine the future direction of the representation process, and will touch and concern every employer subject to the jurisdiction of the Act.

4. The issue presented here is one which was left unanswered by this Court's *Gissel* decision. Since it is a question that can arise in every case where a union demands recognition, its potential for recurrence is immeasurable, and the consequent need for resolution manifest. Because of its broad representation of employers, the Chamber is in a position to present arguments to the Court which might not otherwise be advanced by the parties.

5. In addition to the importance of the issue raised herein for the Chamber's members generally, the Chamber specifically seeks permission to present its views as *amicus curiae* in these cases because, while the interests of Linden Lumber Division, Summer and Co., the employer in one case, are represented, the Employer in the other case, Wilder Mfg. and Co., did not participate in the court of appeals and its particular interests are unrepresented before this Court. Thus, even though the Chamber seeks to file the attached *amicus* brief subsequent to the filing of the petitions by the Board and Linden Lumber, which the Chamber supports, the Chamber as a representative of the interest of employers believes its participation to be warranted.

WHEREFORE, for the foregoing reasons, the Chamber of Commerce of the United States respectfully requests

that this Motion for Leave to File an Amicus brief be granted.

Respectfully submitted,

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Respondents.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS

The interest of the Chamber is set forth in the foregoing "Motion For Leave To File Brief Amicus Curiae".

REASONS FOR GRANTING THE WRIT

I.

THE INSTANT CASES RAISE A SIGNIFICANT UNANSWERED QUESTION INVOLVING THE FUTURE DIRECTION TO BE TAKEN IN THE ADMINISTRATION OF THE NATIONAL LABOR RELATIONS ACT

In *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court expressly left unanswered the question whether a bargaining order based on asserted evidence of union majority status other than certification as a result of a National Labor Relations Board election "is ever appropriate in cases where there is no interference with the election processes." *Id.*, at 595, 601, n. 18.[1] The instant cases raise the important unanswered question.

While both cases herein raise the same general issue, the asserted evidence of majority support which led to the filing of unfair labor practice charges against the respective employers was different. In *Linden Lumber* (No. 73-1231) the Union's claim of purported majority status was based on union authorization cards. In *Wilder* (No. 73-1234) when the Employer's representative, upon whom demand for recognition was made, was unable to respond to the Union without consulting an absent company official, the Union established a picket line at the Employer's plant to evidence its alleged majority status. In both cases the unions chose to forego the Board's election processes, filed unfair labor practice charges and engaged in protracted strikes. In neither of the cases did the employers commit any independent unfair labor practices that would have precluded the holding of a fair Labor Board election. Nonetheless, the court below refused to hold that these employers, in merely declining to accede to the unions recognition demands, were within their statutory rights.

[1] In *Gissel* the Court found that a bargaining order would be appropriate where an employer, confronted with a union claim for recognition based solely on union authorization cards, commits "serious unfair labor practices" that preclude the holding of a fair election, and that absent such unlawful conduct, the employer "can demand an election with a simple 'no comment' to the Union." *Id.*, at 594.

The problem of the extent to which extrinsic evidence of alleged majority status, in the form of authorization cards or a picket line, imposes a statutory duty upon employers in the absence of any unlawful conduct on their part is both significant and recurrent. As was recognized in *Gissel*, the imposition of a bargaining obligation on an employer where the union's representative status has not been determined by the results of a valid Board election invokes an uncertainty as to the union's claimed status that poses a problem of great significance to the Board in its administration of the Act. In the instant cases, the Board has attempted to remove the remaining vestige of uncertainty, left by *Gissel*, by giving full effect to this Court's view that the orderly election process is the "preferred route" [2] to resolution of union recognitional claims.

The standard established by the Board for resolving the question herein encourages unions seeking recognition to avail themselves of the statutory election process and thereby avoid the uncertainties and resultant litigation and industrial strife which that process is designed to avoid and which so often attend when unions seek to bypass that process. The Court below, on the other hand,

[2] *Gissel, supra,* at 602.

has fashioned a rule which encourages union resort to the pre-*Gissel* quagmire of bargaining order recognition, and, in so doing, has seriously restructured the representation process by imposing an affirmative obligation upon employers to initiate that process if they are to avoid an ordered duty to bargain. The positions thus taken by the Board and the Court below with respect to the issue herein are diametrically opposed and pose divergent approaches to the future direction of the representation process under the Act. Guidance by this Court if necessary to resolve this problem.

Further, the need for resolution of this question is most pressing because of the recurrent nature of the problem. As a result of the approach taken by the Court below, it is a problem that, potentially, could arise in, or have effect on, each and every union demand for recognition.

Accordingly, the Chamber respectfully submits that this Court should grant the petitions submitted by the Board and by Linden Lumber Division, Summer & Co., herein, to resolve the issue presented in this matter and to provide the needed direction that only this Court can afford.

II.

THE DECISION BELOW ERRONEOUSLY AND IMPERMISSABLY RESTRUCTURES THE ACT'S REPRESENTATION PROCESS

The very basis of an employer's obligation to recognize and bargain with a union is the designation of the union as the representative by a majority of the employer's employees in a unit appropriate for collective bargaining purposes.[3] A union must establish its majority status in such unit. Clearly, the burden of such proof is on the union. The question involved herein, and one which has plagued

[3] National Labor Relations Act, as amended, Section 9(a), 29 USC Sec. 159(a).

the Board for years, is simply how to determine this proof when a union seeks to establish its majority status and compel an employer to bargain when it has elected to bypass the Board election procedures and resort to "self-help".

For years, the Board applied what was known as the *Joy Silk* doctrine[4] to resolve this problem. Under that doctrine, an employer presented with asserted evidence of union majority status could not lawfully refuse to bargain with a union claiming recognition unless he had a "good faith doubt" as to the union's representative status. Evidence of an employer's lack of good faith doubt was established either by his commission of independent unfair labor practices or the employer's failure to justify his reasons for such doubt. Even under the *Joy Silk* doctrine, as it developed, the Board required the General Counsel, *not* the employers, to establish that an employer's refusal to recognize a union claiming recognition was motivated by bad faith.[5] Indeed the difficulty of establishing such subjective motivation led the Board to rely most consistently on the commission of unfair labor practices as evidence of bad faith.[6]

In *Gissel*, the Board acknowledged that under its practice, it had abandoned efforts to ascertain an employer's

[4] *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enf'd.* 185 F.2d 732 (CADC, 1950), *cert. denied*, 341 U.S. 914 (1951).

[5] *Aaron Bros. Co.*, 158 NLRB 1077 (1966); *Jem Mfg., Inc.*, 156 NLRB 643 (1966); *John P. Serpa, Inc.*, 155 NLRB 99 (1965), order set aside, *Retail Clerks Local 1179* v. *NLRB*, 376 F.2d 186 (CA 9, 1967).

[6] See, e.g., *Joy Silk Mills, Inc., supra; Benson Wholesale Co. Inc.*, 164 NLRB 536 (1967); *Taitel & Son*, 119 NLRB 910 (1957). Moreover, even prior to *Gissel*, unfair labor practices too insubstantial to warrant an inference of lack of good faith doubt in rejecting a union's recognition demand were held not to support bargaining orders. *Hammond & Irving, Inc.*, 157 NLRB 1071 (1965); *Hercules Packing Corp.*, 163 NLRB 264, *affirmed*, 386 F.2d 790 (CA 2, 1967).

subjective "good faith doubt" as unworkable, and this Court voiced approval of that practice. *Gissel*, *supra*, at 609. Similarly, in the instant cases, the Board rejected as unworkable the same subjective inquiry into an employer's asserted "independent knowledge" as a "return to the good faith doubt thicket." Thus, the Board has developed a clear rule to be administered in all cases—a rule which is consistent with the union's burden of proof and which avoids the evidentiary impossibility of determining an employer's subjective state of knowledge. Under the Board's current rule, an employer's subjective state of knowledge is irrelevant.

The decision of the court below, however, resurrects a doctrine of good faith and presumptions of good faith by which to measure the legality of an employer's conduct which this Court disapproved in *Gissel*. Thus, the Court below recognized the inherent evidentiary unreliability of such asserted manifestations of union majority support as were rejected by the Board:

> "Refusal to cross a picket line may reflect mere fear, See *NLRB* v. *Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir., 1971), *cert. denied*, 404 U.S. 826 (1971), or it reflects what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative." *Truck Drivers Local 413* v. *NLRB*, —— F.2d ——, 84 LRRM 2177 (CADC, 1973) 2185, n. 44.

Nonetheless, the court determined to accord this concededly unreliable evidence a role in determining an employer's good faith and, hence, his statutory culpability. Accordingly, the court, contrary to the Board, viewed picket lines, as in *Wilder*, and union authorization cards, as in *Linden* as creating:

> "[A] sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid any duty to bargain and any inquiry into the actuality of his doubt." *Id.*, at 286.

The court thus interpreted Section 9(c)(1)(B) of the Act,[7] which provides for employer representation petitions, as compelling, under the penalty of Section 8(a)(5),[8] an affirmative obligation on the part of an employer to institute the representation process.

The court's interpretation is an erroneous construction of Congress' purpose which motivated the enactment of subsection 9(c)(1)(B). That legislative history indicates that that subsection was enacted to eliminate the unfairness that existed under the Act prior to the 1947 amendments, which permitted employers to file petitions only when confronted with claims to two or more unions seeking recognition; the requirement that an employer be presented with a claim for recognition prior to exercising his right to petition was inserted not,—as the court below reasons—to compel an employer to institute the representation process upon demand, but merely to prevent employers from petitioning "on the first day that a union organizer distributed leaflets at his plant", i.e., to prevent abuse of the representation process.[9]

Further, the lower Court's alternatives to an employer petition call upon the Board to re-establish the murky "good faith doubt" test that had become unworkable and that was laid to rest in *Gissel*.[10] Moreover, the decision

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[7] 29 USC Sec. 159(c)(1)(B).

[8] 29 USC Sec. 158(a)(5).

[9] H.R. Rep. No. 245, 80th Cong. 1st Sess., 35 (1947); I Legislative History of the Labor Management Relations Act, (I Leg. Hist. p. 326); S. Rep. No. 105, 80th Cong. 1st Sess. 10-11 (1947), I Leg. Hist. pp. 416-417.

[10] The Court's suggestion would create the anomolous situation where an employer who committed no unfair labor practices but

below, by placing the burden of instituting the representation process on employers, restructures and alters the nature of that entire process. As set forth above, the burden of proving its entitlement to representative status in an appropriate unit is on the union. It always remains on the union. If an employer were required, as a matter of Board policy, to institute representation proceedings every time a union claimed recognition, the union would be relieved of its burden of establishing a sufficient showing of interest to gain an election.[11] Additionally, as the Court below found, the employer would be required to designate the bargaining unit and "therefore would not be entitled, as an objecting party, to request a [representation] hearing."[12] The effect of this would permit the union to escape inquiry into the appropriateness of the unit, or inclusions or exclusions of categories of employees within that unit, that the union might have sought had it filed a petition.

Aside from this impermissable shifting of burdens from the unions seeking representation, to employers, the rule suggested by the Court of Appeals below leads to tactical misuse and fosters industrial disruption contrary to the nature and the purpose of the representation process. Certainly, as indicated by the legislative history of Section 9(c)(1)(B), the representation process is not a tool or lever which an employer can use to gain unfair

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who, because he is faced with a picket line, is deemed to have subjective "knowledge" of union majority status, would be required to bargain, while another employer, who, under *Gissel*, had committed insubstantial unfair labor practices having no impact on the election process, would not be compelled to bargain.

[11] A union petition filed under Section 9(c)(1)(A) requires that the petition be supported by 30% of the employees in the unit. An employer petition filed under Section 9(c)(1)(B) requires no such interest showing. National Labor Relations Board Statements of Procedure, 29 CFR Sec. 101.18(a).

[12] 84 LRRM at 2186.

advantage in order to defeat a union campaign. Equally, that process is not designed to afford unions similar tactical maneuverability. However, the decision of the Court below permits unions to use the Board's procedures for such purpose.

A union, by demanding recognition, could at its option force an employer either to recognize it or file an employer petition even if the union does not have majority support. By setting up a picket line with a few loyalists, which is honored out of fear or respect, a union could force an employer either to recognize it, even though the majority of employees did not desire to be represented by that union, or to file a representation petition which the union would be unable validly to file.

There are further tactical misuses inherent in the rule articulated by the court below. For example, the unions argued below that an employer who files a petition without actual doubt as to the union's majority status violates Section 8(a)(5) as much as he does when, for example, faced with a picket line, he refuses to recognize the union. The lower court felt that it need not determine this question. 84 LRRM at 7186. Consideration of this union contention, however, necessarily reflects the untenable position in which that court's decision places employers. If a union which actually does possess majority support in a given unit were to demand recognition, and the employer, pursuant to the court's rule, files a petition asserting a different unit to be appropriate, or raising other unit issues,—the resolution of which would be undesirable to the union, the union could then take the position that the employer did not actually doubt the union's majority status with respect to unit selection; that the employer's petition was merely dilatory; and that the employer thereby violated Section 8(a)(5).[13] In this

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[13] In an unfair labor practice proceeding, the union could prevail in its unit assertion since the Act speaks of "*a* union appropriate"

way, a union could circumvent the election procedure and still obtain a bargaining order. Equally, under the court's suggested rule, a bargaining order would lie where an employer does not file a petition but initially rejects the union's demand. The employer is thus faced with a Hobson's choice, placed in that position by a rule which permits such manipulation of the Board's processes.

Contrary to the view of the court below, the desired expedition and avoidance of protracted litigation would not result if the Board were required to implement the decision below.[14] Certainly, restructuring the Board's representation process in a manner that dispenses with prerequisites for certification and that makes that process a lever for manipulation is destructive of that process, and is too high a price to pay for the questionable returns that might result.

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for bargaining purposes. In a given situation, there may be more than one unit appropriate for bargaining purposes. Since, under the Board's "blocking" practice a Section 8(a)(5) charge, which presupposes majority representation, "blocks" the processing of a representation petition until the unfair labor practice case is disposed of, a union could obtain favorable unit determination and a bargaining order through its 8(a)(5) proceeding against the employer despite the filing of a petition by the employer in which he seeks a different appropriate unit.

[14] The instant cases which have been in litigation for a number of years and which involved industrial disruption of many months, are a prime example of the reasons for encouraging the Board in its attempt to avoid such results.

CONCLUSION

For the foregoing reasons, and those urged by the National Labor Relations Board and Linden Lumber Division, Summer & Co., the Chamber respectfully prays that their respective petitions for Writ of Certiorari be granted.

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No. 73-1231

In the Supreme Court of the United States

OCTOBER TERM, 1973

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF FOR PETITIONER LINDEN LUMBER DIVISION, SUMMER & CO.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO.,
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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF FOR PETITIONER LINDEN LUMBER DIVISION, SUMMER & CO.

OPINIONS BELOW

The opinion of the court below (Pet., pp. A1-A26) [1] is reported at 487 F. 2d 1099. The decision and order of the

[1] The opinion of the lower court, as well as the opinions of the Board and its administrative law judge, are reproduced in the petition for a writ of certiorari (hereafter "Pet.") which Linden Lumber Division, Summer & Co. (hereafter "Linden" or "the Company") filed with this Court. Supplemental materials, including

National Labor Relations Board (Pet., pp. A33-A90) is reported at 190 NLRB 718.

JURISDICTION

The judgment of the Court of Appeals (Pet., pp. A27-A28) was entered on September 13, 1973. Thereafter Linden was granted leave to intervene before the Court of Appeals and filed a timely petition for rehearing which was denied on November 6, 1973 (Pet., p. A31). This Court, on December 23, 1973, entered an order extending the time for Linden to file its petition for a writ of certiorari until February 10, 1974 (Pet., p. A32). The petition was filed on that date, and on April 22, 1974, the Court granted the petition and consolidated this case with No. 73-1234. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. § 151 *et seq.*), are set forth in the petition at pp. A91-A92.

QUESTION PRESENTED

May an employer be compelled to bargain with a union asserting to represent its employees where the union's majority status has not been established through the National Labor Relations Board's election processes and the employer has not interfered with such processes so as to preclude a fair election?

(Footnote continued)

portions of the transcript of the underlying proceedings before the administrative law judge, as well as exhibits introduced in that proceeding, have been reproduced in a separate supplemental joint appendix prepared by the National Labor Relations Board, the petitioner in consolidated case No. 73-1234.

STATEMENT OF THE CASE.

Having obtained authorization cards[2] from a majority of the Company's employees in an appropriate bargaining unit, the Union[3] demanded, by letter dated January 3, 1967,[4] that it be recognized as the employees' collective bargaining representative. On January 5, the Company responded by letter, stating that it doubted the Union's claimed majority status and suggesting that the Union petition the Board for an election. On January 6, the Union filed such a petition. In ensuing discussions to establish the details for an election, Linden declined to enter into a consent election agreement or abide by the results of an election on the ground that the Union's organizational campaign had been improperly assisted by Company supervisors.[5] The Company did, however, offer to enter into a consent agreement with the Union if it would submit a "fresh" showing of interest untainted by supervisory participation.

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[2] Nothing in the authorization cards served to warn the employees that signing the cards could constitute a waiver of their right to an election. The cards (General Counsel's Exh. No. 4 reproduced in the Joint Appendix) provided:

> "I the undersigned employee of Linden Lumber Company hereby request membership in Truck Drivers Union Local No. 413 and authorize said union to represent me and in my behalf to negotiate an agreement as to hours of labor, wages, union shop, and other employment conditions."

[3] Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[4] All dates hereafter refer to 1967 unless otherwise noted.

[5] The Board does not permit litigation of supervisory solicitation matters in representation case hearings, and a refusal to bargain is, accordingly, necessary to judicially test that question. *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457 (9th Cir. 1947).

The Union voluntarily withdrew its election petition on February 3 and, on February 6, presented the Company with a renewed bargaining demand accompanied by an employee statement, prepared at a Union meeting attended by the very employees whose supervisory status was in dispute, reaffirming support for the Union. The Company declined this demand by letter dated February 8, asserting that the Union's purported membership was still improperly influenced by supervisors and that, in any event, as Linden had previously urged, the Union should prove its claim in a Board election. The Union instead continued to spurn the Board's election processes and struck for recognition on February 15.[6] Shortly after commencement of the strike, which continued until June 1, the Union filed the instant refusal to bargain charges against Linden. It is undisputed that the Company committed no unfair labor practices which precluded a fair election.[7]

The Board concluded that Linden ". . . should not be found guilty of a violation of Section 8(a)(5) [of the Act] solely on the basis of its refusal to accept evidence of majority status other than the results of a Board election." In reaching this conclusion, the Board expressly

[6] Not all of the employees who signed authorization cards subsequently joined the strike (Pet., p. A90); similarly, in the companion *Wilder* case, not all of the card-signers continued to picket for the duration of the strike (Bd. Pet., p. 121).

[7] At the conclusion of the strike, the Company refused to reinstate two employees it had contended were not protected by the Act. The Board found this to be an unfair labor practice although of insufficient impact to prevent "a fair and truly representative election" (Pet., pp. A37-A38); the Company thereupon reinstated the two employees and this issue was not presented to the court below.

declined "to reenter the 'good faith' thicket . . . which we announced to the Supreme Court in *Gissel* [*N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969)] we had 'virtually abandoned . . . altogether', *id.*, 594" (Pet., p. A41). In the Board's view, bargaining orders, in the absence of election interference, would be appropriate only where, in contrast to the present case, the Union's majority status had been proven by a "mutually acceptable and legally permissible means" (Pet., pp. A41-A42).

On petition for review, the Court of Appeals reversed. It noted that the present question had been left undecided in *Gissel* and that, in its opinion, the position adopted by the Board was "inconsistent with the Act." (Pet., pp. A13, n. 25 and A26). The court, contrary to the Board, declared that an employer faced with a demonstration of union majority support cannot merely refrain from election interference; that a company confronted by such a situation must affirmatively "evidence good faith" and "resolve the possibility [of majority status] through a petition for an election" or, alternatively, recognize the union forthwith (Pet., p. A23). The court remanded to the Board "to reconsider, what option, consistent with the statute, it wishes to follow" (Pet., p. A26).

SUMMARY OF ARGUMENT

I. The legislative history and judicial evolvement of the National Labor Relations Act, as well as this Court's opinion in *N.L.R.B.* v. *Gissel Packing Company*, 395 U.S. 575 (1969), all mandate that an employer who does not interfere with the Board's election processes, nor voluntarily agree to resolve a union's claim of majority status by other permissible means, may lawfully insist that the union prove its status in a secret ballot election.

A. The Board recognized early in its administration of the Act that secret ballot elections were the most de-

sirable vehicle for ascertaining employee representational desires. Congress agreed, and in the Taft-Hartley amendments in 1947, restructured the Act to emphasize its preference for resolving recognition claims through the Board's election machinery. This preference for an election is dictated by the Act's concern with protecting employee free choice and the concomitant inferiority of authorization cards or other secondary evidence of majority status in fulfilling that goal.

B. Notwithstanding the superiority of the election processes, employers may still voluntarily recognize unions on the basis of secondary evidence and be subject to a bargaining order if they renege upon that recognition. Similarly, employers whose own misconduct interferes with a fair election may be subject to a bargaining order predicated upon authorization cards or other secondary evidence of majority status.

C. The preference for elections which was manifested in the 1947 amendments to the Act, together with the Board's determination, approved by *Gissel,* that an employer's good faith or subjective motivation is irrelevant, demonstrate that an employer who does not voluntarily recognize a union nor interfere with the Board's election processes cannot be subject to a bargaining order in the absence of union success in a secret ballot election. Any other view would catapult secondary evidence into the functional equivalent of an election and, notwithstanding the three-category bargaining order approach of *Gissel,* impose an absolute bargaining obligation on an employer confronted by a card-based bargaining demand or recognitional strike.

II. The lower court's conclusion that, where a union presents secondary evidence of majority status to an employer he must forthwith recognize the union or petition for an election, is wrong. Imposition of such a novel and unwarranted penalty for declining recognition constitutes an improper judicial restructuring of the Act.

A. The lower court's conclusion that an employer "must be put to some . . . kind of test to evidence good faith" (Pet., p. A26) disregards *Gissel's* repudiation of *any* test which seeks to divine employer motivation. If good faith cannot be used as a basis for a bargaining order, it similarly cannot be used to force upon an employer an obligation not imposed by the Act.

B. The Court of Appeals' requirement that an employer must file an election petition distorts section 9(c)(1)(B) of the Act which only permits, but does not require, an employer to file such a petition. It also vitiates an employer's right, guaranteed by both the First Amendment and by section 8(c) of the Act, to lawfully attempt to persuade his employees to refrain from unionization. Finally, contrary to the congressional purpose manifested in section 8(b)(7) of the Act, the decision below encourages protracted recognitional strikes, rather than resort to the Board's election machinery, to resolve representational questions.

ARGUMENT

I.

AN EMPLOYER WHO DOES NOT INTERFERE WITH THE BOARD'S ELECTION PROCESSES MAY LAWFULLY INSIST THAT A UNION DEMONSTRATE ITS CLAIMED MAJORITY STATUS IN A SECRET BALLOT ELECTION.

In *Gissel,* this Court recognized that the Board's election procedures were the "preferred route" for a union to demonstrate its majority status; that indeed,

> . . . the policies reflected in § 9(c)(1)(B) fully support the Board's present administration of the Act . . . an employer can insist on a secret ballot election, unless, in the words of the Board, he engages "in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election." 395 U.S. at 600, 596, 602.

Gissel recognized, however, that, notwithstanding the more desirable route of an election to resolve representational claims, secondary evidence of majority status, such as authorization cards or strike support, although clearly less reliable, could serve as a basis for a remedial bargaining order when a fair election was rendered impossible. The Court did not reach the question presented here, *viz.,* "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes" (395 U.S. at 595 and n. 18). Both the legislative history and judicial evolvement of the Act, as well as *Gissel* itself, all require that this unanswered question be resolved in negative.

A.

The starting point is section 9 of the original Wagner Act. That section permitted the Board to certify a union as a result of either a secret ballot election or "any other suitable means" (29 U.S.C. § 159(c) (1947 ed.)) as, e.g., presentation of authorization cards from a majority of employees or employee support for a union-called strike or strike vote. *Gissel,* 395 U.S. at 596-7. The Board, nevertheless, soon concluded that "the policies of the Act will be best effectuated if the question of representation . . . is resolved in an election by secret ballot" rather than by such secondary evidence. *Cuhahy Packing Company,* 13 NLRB 526, 531-532 (1939). This elimination of "other suitable means" as the basis for Board certification was, in turn, codified by the 1947 Taft-Hartley amendments to the Act.

Congress, in its efforts to encourage utilization of the Board's election machinery, went further than limiting the benefits of certification to unions which survive the crucible of an election. This congressional design was also manifested in a variety of other amendments: an employer, as well as a union, was thereafter permitted by section 9(c)(1)(B) to file an election petition (see *Gissel,* 395 U.S. at 599-600); section 8(c) was added to guarantee the right of employees to express their views on unionization; and the electoral process was further protected by the insertion of section 8(b)(1)(A) to forbid coercive union tactics and by the 1959 inclusion of section 8(b)(7) to preclude certain forms of recognitional picketing.

The reasons for such congressional recognition of "the acknowledged superiority of the election process" (*Gissel,* 395 U.S. at 602) are not difficult to discern. In contrast to the Board's "laboratory" election conditions, which are

"as nearly ideal as possible",[8] secondary indicia of majority support are markedly inferior. Employees may engage in a strike, for example, for a multitude of reasons—fear,[9] respect for a picket line, peer group pressures, personal hostilities and the like—which are not tantamount to selection of the union as a bargaining representative. Authorization cards are similarly a "notoriously unreliable" means for ascertaining employee choice[10] which neither register changes in voter attitude resulting from the election "crucible"[11] or properly manifest "the ultimate choice

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[8] *General Shoe Corp.*, 77 NLRB 124 (1948), quoted with approval in *Gissel*, 395 U.S. at 596, n.8; *Dal-Tex Optical Corp.*, 137 NLRB 1782 (1962).

[9] See *N.L.R.B.* v. *Union Carbide Corporation*, 440 F. 2d 54, 56 n.1 (4th Cir. 1971), *cert. den.* 404 U.S. 826, in which the court quoted the reasons for employee Mullins refusal to cross a picket line at his place of work:

"Q. Well, why didn't you cross the picket lines, Mr. Mullins?

A. Well, I was afraid.

Q. Any other reason?

A. Well, that was the main reason. I was afraid. It was too dangerous.

Q. And why were you afraid?

A. Well, I was afraid somebody would beat me up or burn my house down or something like that."

[10] *Sunbeam Corp.*, 99 NLRB 546, 550-1 (1952). See also, e.g., *N.L.R.B.* v. *Flomatic Corp.*, 347 F. 2d 74-78 (2nd Cir., 1965), and *N.L.R.B.* v. *S.E. Nichols Co.*, 380 F. 2d 438, 442 (2nd Cir. 1967).

[11] Significantly, a recent comprehensive study (Goldberg and Getman, *The Myth of Labor Expertise*, 39 U.Chi. L. Rev. 681, 692 (1972)) concluded that voter positional changes during a Board election campaign are almost always *away* from initial support for the union: "[T]here have been almost no changes in the other direction." See also Perl, *The NLRB and Bargaining Orders*, 15 Vill. L.Rev. 106, 115-116 (1969).

of a bargaining representative . . ." *Midwest Piping and Supply Co.*, 63 NLRB 1060, 1070 n.13 (1945). Employees who sign cards may, as in this case and *Wilder*, not necessarily even support a subsequent strike. Alternative selection techniques, in short, are simply not, as the Board, Congress and this Court have repeatedly emphasized, as accurate a reflection of employee desires as a Board election.

B.

The congressional preference for elections did not preclude an employer from utilizing secondary indicia of employee sentiment to voluntarily recognize a union.[12] The Taft-Hartley Congress specifically left intact the "designation or selection" language of section 9(a) of the Act, rejected a House modification of section 8(a)(5) and "did not restrict an employer's duty to bargain under section 8(a)(5) solely to those unions whose representative status is certified after a Board election." *Gissel*, 395 U.S. at 596-8, 600. Authorization cards and other secondary evidence may also be utilized to establish the requisite "showing of interest" under section 9(c)(1)(A) to invoke the Board's election processes. And, as *Gissel* made clear, so that an employer cannot profit from his own misconduct (*Franks Brothers* v. *N.L.R.B.*, 321 U.S. 702 (1944)), where there is "conduct disruptive of the bargaining process, cards may be the most effective—perhaps the only—way of assuring employee choice." *Gissel*, 395 U.S. at 602.

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[12] See, e.g., *N.L.R.B.* v. *Montgomery Ward and Co.*, 399 F. 2d 409 (7th Cir., 1968); *N.L.R.B.* v. *Broad Street Hospital & Medical Center*, 452 F. 2d 302 (3rd Cir. 1971). Cf. *Garment Workers Union* v. *N.L.R.B. and Bernhard-Altmann Corp.*, 366 U.S. 731 (1961), proscribing recognition, even if in good faith, of a minority union.

In sum, while the Taft-Hartley amendments eliminated authorization cards or other secondary evidence as a basis for certification, they did not foreclose the use of such evidence to otherwise demonstrate majority support. It does not follow, however, particularly in view of the repeatedly expressed preference for elections, that the availability of other methods whereby "an employer *may* satisfy itself as to the union's majority status" (*United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 72, n. 8 (1956) (emphasis added)), can be equated to an affirmative *obligation* to grant such recognition. A card majority or other asserted secondary evidence of employee sentiment does not, as the court below properly concluded (Pet., p. A19, n.42), "*per se* invoke . . . a duty to bargain."[13]

To be sure, prior to *Gissel,* where an employer did not have "a good faith doubt as to the Union's majority status" or there did not exist a "bona fide dispute" under *United Mine Workers,* a bargaining order could issue. *Gissel,* 395 U.S. at 592-3, 597, n. 11 and 598. *Gissel,* however, endorsed the Board's termination of precisely such an inquiry into employer good faith and subjective motivation (*Id.* at 594). It rendered immaterial any assessment of the employer's knowledge or state of mind when declining to recognize a union which assertedly enjoyed majority support on the basis of secondary evidence. Surely, if a bargaining order is not to be imposed

[13] See also Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The "Independent Knowledge" Standard*, 39 U.Chi.L.Rev. 314, 318 (1972); and Welles, *The Obligation To Bargain on The Basis of A Card Majority*, 3 Ga.L.Rev. 349, 351 (1969).

where they may have been only "minor or less extensive" unfair labor practices (*Gissel,* 395 U.S. at 615), "it is difficult to perceive how [a bargaining] order issued in the absence of any independent unfair labor practices may be upheld."[14] The "key to the issuance of a bargaining order" is not whether a union presents convincing or unconvincing evidence of majority support but, conversely, as the Board concluded here, whether the employer has committed "serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election". *Gissel,* 395 U.S. at 594.

II.

AN EMPLOYER WHO DOES NOT INTERFERE WITH THE BOARD'S ELECTION PROCESSES, AND INSISTS THAT A UNION DEMONSTRATE ITS CLAIMED MAJORITY STATUS IN A SECRET BALLOT ELECTION, IS NOT REQUIRED TO PETITION FOR SUCH AN ELECTION.

The Court of Appeals concluded that, although secondary evidence of union support does not automatically invoke a duty to bargain, if an employer chooses not to recognize a union on the basis of such evidence, "[t]he employer must be put to some other kind of test *to evidence good faith"*; that the contrary position adopted by the Board "is inconsistent with the Act and . . . must be reversed." (Pet., pp. A19, n. 42 and A26; emphasis added). Apart from the offense that adoption of this heretofore un-

[14] Foss and Kobdish, *Gissel Packing and Bargaining Orders, Or: A Funny Thing Happened on the Way to the Election*, 41 Geo. Wash. L. Rev. 44, 81 (1972).

predecented view does to basic principles of administrative comity,[15] it is incompatible with both *Gissel* and the Act itself.

A.

As demonstrated above, the thrust of the Taft-Hartley amendments and *Gissel* was two-fold: to establish the superiority of the election processes and to eliminate any inquiry into an employer's subjective motivation to assess the propriety of a bargaining order. Consistent with these principles, apart from those instances where employer misconduct obviates a fair election, bargaining orders premised on secondary evidence of majority status must be restricted to objective repudiations of an agreement to recognize or bargain with a union. *Snow & Sons*, 134 NLRB 709, *enf'd*, 308 F.2d 687 (9th Cir. 1962), where an employer "reneged on his agreement to bargain" and only then "in-

[15] The "great deference to the interpretation given the statute by the officers or agency charged with its administration" is "particularly . . . due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly . . .'" *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Board decision here was based upon such considerations (Pet., pp. A41-42), and even if, assuming *arguendo*, it was susceptible of "different constructions" (*Udall*, 380 U.S. at 18), it must be accorded deference unless it falls within the extreme classification of amounting to plain rejection of Congressional policy. *Local Lodge No. 1424, Machinists* v. *N.L.R.B.*, 362 U.S. 411, 428-429 (1960). That extreme situation is obviously rendered inapplicable in this case by the lower court's own acknowledgment (Pet., p. A14) that there "is no clear cut" directive in either "the statute or the legislative history" concerning "the focal issue" involved. See also *Food Store Employees, Local 347* v. *N.L.R.B.*, ... U.S. ....., 86 LRRM 2209 (May 20, 1974); and *Gissel*, 395 U.S. at 612, n. 32.

sisted on an election" (*Gissel*, 395 U.S. at 593), presented the latter situation. That case, which has been limited by the Board to its facts (*id.* at 594),[16] merely applied the well-established rule that once an employer voluntarily recognizes a union he may not thereafter breach that

[16] Dissenting Board Members Fanning and Brown's construction of *Snow* to stand for a broad "independent knowledge" test which would justify a bargaining obligation in this case (Pet., pp. A45, A50-A51) is no longer tenable. *Snow* expressly rested upon the good faith doubt rationale of *Joy Silk Mills, Inc.*, 85 NLRB 1263, *enf'd.*, 185 F.2d 732, (D.C. Cir., 1950), *cert. den.*, 341 U.S. 914. See *Snow*, 134 NLRB at 710-711 ("The Board has held [citing *Joy Silk Mills*] that the right of an employer to insist on a Board-directed election is not absolute. Where, as here, the Employer entertains no reasonable doubt either with respect to the appropriateness of the proposed unit or the Union's representative status, and seeks a Board-directed election without valid ground therefor, he has failed to fulfill the bargaining requirements under the Act"). The Board, however, has now rejected this approach (see n. 19, *infra*) and *Snow* is further undermined by *Gissel's* approval of the demise of *Joy Silk Mills*. Members Fanning and Brown's view of *Snow*, therefore, is tantamount to resurrection of a repudiated good faith doubt test and, even if once supportable, is now without merit.

agreement;[17] an employer may not renege upon an agreement to conditionally recognize a union any more than he may refuse to comply with an agreement to grant a labor organization unconditional recognition or refuse to abide by a collective bargaining contract. In none of these cases is any inquiry into subjective motivation pertinent. Here, by contrast, the Court of Appeals has insisted upon a "test to evidence good faith" (Pet., p. A26). The Board's refusal to reenter this "thicket" (Pet., p. A41) is thus consistent with *Snow & Sons* as consistently interpreted by the Board prior to *Gissel*[18] and approved therein. 395 U.S. at 594.

The lesson of *Gissel*, which the Board,[19] courts[20] and

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[17] see e.g., *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954); and the cases cited at n.10, *supra*.

[18] See Comment, 39 U.Chi.L.Rev. at 320; see also *Strydel, Inc.*, 156 NLRB 1185, 1187 (1966), in which the Board, distinguishing *Snow* and finding no lawful refusal to bargain, found of no force the fact that the company had "denied recognition while rejecting the Union's proposal for submission of the cards to impartial determination." Such a denial, according to the Board, "does not, standing alone, provide an independent basis for concluding that the instant denial of recognition was unlawful."

[19] As the Board had announced in *Aaron Brothers*, 158 NLRB 1077 (1966), "an employer no longer needed to come forward with reasons for rejecting a bargaining demand". At oral argument of *Gissel*, the Board reaffirmed that "an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct . . ." *Gissel*, 395 U.S. at 593-4.

[20] See, e.g., *N.L.R.B.* v. *River Togs, Inc.*, 382 F. 2d 198, 206-7 (2nd Cir. 1967).

commentators[21] had all presaged, is that the motive or state of mind of an employer in declining a demand to bargain is irrelevant. As long as the employer refrains from polluting the election atmosphere, and has not agreed to an alternative means of determining majority status, then he has no further obligation. He may, contrary to the decisions below (Pet., p. A26), "disregard" the union's cards "without rhyme or reason" or, as this Court quoted the Board's current practice in *Gissel*, 395 U.S. at 594, respond "with a simple 'no comment' to the union". For if an employer cannot be compelled to bargain in such a case—as the authorities discussed in Part I of this brief amply demonstrate—there is similarly no justification for imposing upon him a new obligation as an alternative penalty for declining recognition. The union in such a case, if it desires to obtain bargaining rights, can readily utilize its cards to obtain an election, as is the usual and preferred practice (395 U.S. at 596 and n. 7) or even, once such a petition has been filed, picket the employer with impunity until there has been a Board certification. The employer is concurrently obligated, under pain of a *Gissel* bargaining order remedy, to avoid any interference with the election procedures. The Court of Appeals, nevertheless, added still another significant ramification of a card-based bargaining demand: that the employer confronted by such a situation, if he refuses recognition, must initiate the Board processes or otherwise evidence his good faith. The Board, as the expert entrusted by Congress to administer the Act, properly rejected such an unwarranted alteration of the statute.

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[21] See, e.g., *Welles, supra* n.11, at 355-7; and Lesnick, *Establishment of Bargaining Rights Without an Election*, 65 Mich. L.Rev. 857, 858-9, 864-5 (1967).

B.

The decision below would impose a substantial judicial alteration of the statute:

1. Section 9(c)(1)(B) of the Act merely *permits* an employer to file an election petition; it in no way *requires* that a petition be filed, as the lower court suggested, in order to "test . . . good faith" (Pet., p. A26). That section, as *Gissel* observed (395 U.S. at 599-600, n. 16), was primarily intended to remove "discrimin[ation] against employers" and create a method for terminating union organizational harassment. In fact, by conditioning the filing of an employer petition on a prior request to bargain, Congress sought to insure that employers would not prematurely force an election during the nascent stages of a union organizational campaign and thus pretermit that campaign, *Id.* at 599, n. 15.[22] Nothing in the legislative history, nor in any case prior to the decision below, indicates that Congress also sought to impose a mandatory filing obligation on employers and to simultaneously free a union demanding recognition from (a) producing the requisite interest showing required by section 9(c)(1)(A) to support a union-filed petition and (b) bearing the significant tactical disadvantage of initially selecting the

[22] See Senate Report No. 105, pp. 11, 25, (1947) I Leg. Hist. of Labor Management Relations Act ("I Leg. Hist."), pp. 417, 431 and House Report No. 245, 80th Cong. 1st Sess., 35, 93 Cong. Rec. 3954 (1947), I Leg. Hist., p. 326. As Chief Judge Haynsworth summarized these portions of the legislative history in *N.L.R.B.* v. *Logan Packing Company*, 386 F. 2d 562, 570 (4th Cir. 1967), reversed by implication in *Gissel* on other grounds: "It was made plain in the Committee reports, . . . that an employer, after receipt of a demand to bargain from a union . . . *need not petition for an election*" (emphasis added).

appropriate bargaining unit and, instead, control both the commencement and duration of the election campaign.[23]

2. The underlying rationale of the decision below, and of the advocates of the position adopted therein, is a desire to expedite the election process and preclude an employer counter-campaign. Pet., p. A24 and n. 48; Comment, 39 U.Chi.L.Rev. at 325-330. The rule adopted by the Court of Appeals, however, as the Board's petition shows (pp. 19-20), is a dubious means of achieving this goal. In any event, the objective sought is one that conflicts with the scheme of the Act. An employer, provided that he avoids election interference, has a "legal right . . . to try to

[23] See Comment, 39 U.Chi.L.Rev. at 326-7: "If . . . the employer were to petition for an election, he would be required to define the appropriate unit and therefore would not be entitled, as an objecting party, to request a [preelection] hearing [under 29 C.F.R. § 102.63(6) (1971)]. Where the employer petitioned for an election, the union, in effect, would be afforded the opportunity to waive the hearing . . ." Such a waiver is likely since (1) "enthusiasm for the union might have peaked when the card majority was obtained and the request for recognition was made . . . a long hearing could result in the dissipation of its majority status"; (2) "the union might decide to accept a smaller employer-suggested unit in order to establish a 'beachhead' from which it could further organize, rather than risk losing the election because of delay"; and (3), "even if the employer proposed frivolous or ridiculous units to foster delay, the regional director could summarily dispose of these suggestions at the 'investigation' stage [pursuant to 29 C.F.R. §102.63 (1971)] in considering the employer petition; no hearing would be necessary". Moreover, assuming the employer was able, without risking a bargaining order, to request a substantially different unit than that proposed by the union, if this unit was "unacceptable to the union, [the union] could obtain dismissal of the employer's petition without penalty by disclaiming interest in the unit . . ."

persuade [his] employees, including those who signed cards, to disavow the union." *N.L.R.B.* v. *Drives, Incorporated,* 440 F. 2d 354, 364 (7th Cir. 1971). Both section 8(c) and the First Amendment permit him to seek to lawfully dissipate a union's card majority. A labor organization does not have any right to have an election at the "peak" of its organizational effort or to be able to shorten the campaign in order to avoid a "sophisticated" employer response. To the contrary, "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union . . . ." *Gissel,* 395 U.S. at 617. It was, in fact, this desire to permit a full exposure of opposing views that, at least in part, motivated the Board to "no longer requir[e] . . . an employer to show affirmative reasons for insisting on an election . . . " *Ibid.* To force an employer to petition for an election, as the decision below would do, while a union is at the pinnacle of its strength after a long and frequently clandestine one-sided organizational drive, or during a coercive recognitional strike, would effectively vitiate any legitimate employer campaign. If the objective of the Act is truly to insure employee free choice, both sides, not just labor organizations, should be able to reach "all employees with [their] . . . arguments in favor of representation . . . [to avoid the situation where] employees are often unaware of that point of view." *Excelsior Underwear Co.,* 156 NLRB 1236, 1240-1 (1966), approved in *N.L.R.B.* v. *Wyman-Gordon Co.,* 394 U.S. 759 (1969).

3. Section 8(b)(7) of the Act was enacted to curb the substantial abuses attendant where a union engages in picketing in order to force an employer to grant recognition and thereby avoid the election process. The decision below, by permitting such a strike to create "a sufficient

probability of majority support" to require that the employer file an election petition even where there is no card majority (Pet., p. A23), flies in the face of the statutory design. *First,* section 8(b)(7)(C) applies to recognitional strikes by even a union enjoying majority status in order that "disputed issues of majority status, whenever possible, [be resolved] by the machinery of a Board election." *C.A. Blinne Construction Co.,* 135 NLRB 1153 (1962).[24] If *Blinne* is correct, as one commentator has noted (*Welles, supra* n. 11, at 353), then "it would obviously be impossible to issue a bargaining order solely because the union had a majority". *Second,* section 8(b)(7)(C) imposes upon a picketing union the obligation to either cease picketing after "a reasonable period of time" or file a petition. The decision below, by compelling the employer to initiate the election process, thus abrogates an employer's right to decline recognition, not file a petition and simply withstand picketing until the union makes its choice.

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[24] See also *Dayton Typographical Union No. 57* v. *N.L.R.B.,* 326 F.2d 634, 637 (D.C.Cir. 1963); and Meltzer, *Organizational Picketing and the NLRB,* 30 U.Chi.L.Rev. 78, 83 (1962).

CONCLUSION

For all the foregoing reasons, it is respectfully prayed that the decision of the Court of Appeals be reversed and this case be remanded to that Court with instructions to enforce the Board's order in its entirety.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 73-1234

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUCK DRIVERS UNION LOCAL NO. 413, AND
TEXTILE WORKERS UNION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 23-50)[1] is reported at 487 F. 2d 1099. The Board's

[1] The opinion covers two cases consolidated in the court of appeals—*Truck Drivers Union Local 413, International Brotherhood of Teamsters, etc.* v. *National Labor Relations Board*, No. 71-1529 (hereafter *Linden*), and *Textile Workers*

decision in *Linden* (Pet. App. C, pp. 54–118) is reported at 190 NLRB 718. The Board's initial decision in *Wilder* (Pet. App. D, pp. 119–159) is reported at 173 NLRB 214, and the decision of the court of appeals remanding for reconsideration (Pet. App. E, pp. 160–164) is reported at 420 F. 2d 635. The Board's two supplemental decisions in *Wilder* (Pet. Apps. F and G, pp. 165–193) are reported at 185 NLRB 175 and 198 NLRB No. 123.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 51–53) was entered on September 13, 1973, and was amended on November 6, 1973. On December 6, 1973, and December 20, 1973, the Chief Justice extended the time of the Board and Linden, respectively, for filing petitions for writs of certiorari to and including Sunday, February 10, 1974. The petitions were filed on February 11, 1974, and were granted on April 22, 1974 (A. 53–54). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 8(a), 9(a) and (c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 158(a), 159(a) and (c)) provide in relevant part as follows:

Union of America v. *National Labor Relations Board*, No. 72–1794 (hereafter *Wilder*).

"Pet. App." refers to the appendix to the petition for certiorari in *National Labor Relations Board* v. *Truck Drivers Union Local No. 413, and Textile Workers Union*, No. 73–1234, "A." refers to the separate appendix to the briefs.

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their

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employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

QUESTION PRESENTED

Whether an employer violates his bargaining obligation under the National Labor Relations Act by declining to accept a union's authorization card or picket line indication of employee support and insisting that the union establish its representative status in a Board election, when the employer has not engaged in conduct that would preclude the holding of a fair election and has not agreed to a voluntary method of determining the union's majority status.

STATEMENT

A. THE BOARD'S DECISIONS

1. LINDEN

At an organizational meeting in December 1966, Norman, an agent of Local No. 413 of the Teamsters Union ("the Union"), obtained from twelve employees of Linden Lumber Division of Summer & Co. ("Linden") [2] signed cards authorizing the Union to represent them for collective bargaining (Pet. App. C, pp. 78–79; A. 8–12, 44).[3] On January 3, 1967, the Union wrote to Linden requesting recognition and stating that a majority of its "truck drivers, warehousemen, production workers, maintenance men and yard men" had designated the Union as their collective bargaining representative (Pet. App. C, p. 79; A. 12–13, 45). On January 6, Linden denied the request for recognition, expressing doubt about the Union's majority status and suggesting that "the proper way to determine such questions" would be for the Union to petition for a Board election (Pet. App. C, p. 79; A. 13, 47). Meanwhile, on January 5, the Union had filed with the Board's Regional Office a petition for a representation election (Pet. App. C, p. 79; A. 13, 46).

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[2] Linden manufactures prefabricated homes and sells lumber products (Pet. App. C, p. 78).

[3] Included were the cards of two employees, Marsh and Shafer, who the Company alleged were supervisors (Pet. App. C, p. 79; A. 3–5, 11–12). Excluding Marsh and Shafer, there were ten employees in the appropriate bargaining unit which the Union sought to represent (Pet. App. C, p. 84).

On February 3, a Board hearing officer held a prehearing conference on the Union's representation petition. During the meeting, the Union's attorney, Smedstad, asked the Company's consultant, Rector, about the possibility of entering into a consent election agreement. Rector said that he would not enter into such an agreement because Local 413 had been organized by supervisors (Marsh and Shafer, see p. 5, *supra*, n. 3), and it would be unlawful for Linden "to recognize any union that had been organized by supervisors" (Pet. App. C, p. 56; A. 33–36). The hearing officer noted that Linden's claim of supervisory influence in the organization of Local 413 related to the Union's showing of interest required to obtain a Board election and could not be litigated at a representation hearing (Pet. App. C, p. 56; A. 36).[4]

When Rector maintained his position, the Union withdrew the representation petition (Pet. App. C, p. 56; A. 37). Thereafter, Rector told Smedstad that, if the Union submitted a new petition supported by a "fresh" 30 percent showing of interest, Linden

[4] See Section 101.18(a) of the Board's Statements of Procedure, 29 C.F.R. 101.18(a); *National Labor Relations Board* v. *Air Control Prods. of St. Petersburg, Inc.*, 335 F. 2d 245, 250–251 (C.A. 5).

Pro-union conduct by a supervisor during an organizational campaign may, however, be grounds for setting aside a representation election or provide a defense to a refusal-to-bargain charge. *Air Control Prods., supra*, 335 F. 2d at 250. Here, the trial examiner ultimately found that Marsh was not a supervisor (Pet. App. C, p. 86), and that, while Shafer was a supervisor, "[t]here is no evidence * * * that he solicited employees or otherwise enlisted their support of the Union" (*id.* at 117).

would enter into a consent election agreement. Smedstad replied that the Union already had "all the people lined up." Rector repeated that, since supervisors had solicited these people, without a fresh showing of interest no consent election could be agreed upon and no bargaining would take place (Pet. App. C, pp. 56–57; A. 38–39.)

The next day, February 4, Union representative Norman met with the employees and informed them of what had occurred at the prehearing conference. Nine employees then signed a statement distributed by Norman reaffirming their desire to be represented by the Union. Both Marsh and Shafer attended the meeting but neither signed the statement (Pet. App. C, p. 57; A. 17–19, 49). On February 6, Norman presented the statement, together with another request for recognition, to Linden's general manager, who referred the matter to Rector (Pet. App. C, p. 57; A. 19–20, 50). On February 8, Rector wrote to the Union denying its renewed request for recognition because "your membership includes supervisors * * * who influenced and dominated employees of the proposed unit." The letter added that the Union had the opportunity to prove its claim before the Board, but had withdrawn its representation petition. (Pet. App. C, p. 57; A. 20–21, 51.)

The Union filed no new petition for an election. Instead, on February 15, all but one of the employees who signed the reaffirmation statement struck in support of the Union's demand for recognition and picketed the Company's premises (Pet. App. C, p. 57;

A. 23–24). On February 23, the Union filed a refusal-to-bargain charge with the Board. The strike terminated on June 1 (Pet. App. C, p. 57).

The Board (Members Brown and Fanning dissenting) held that, absent independent unfair labor practices which would preclude a fair election, an employer "should not be found guilty of a violation of Section 8(a)(5) [of the Act] solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election," and accordingly dismissed the complaint insofar as it alleged that the Company had unlawfully refused to bargain with the Union (Pet. App. C, pp. 63–64).[5] The Board noted that the Company had never agreed to any voluntary means for resolving the Union's claim of majority status other than a Board election (*ibid.*). The Board also rejected the Union's contention that, because the picket line showing gave the Company "independent knowledge" that the Union possessed majority support and the Company made no effort to secure a Board election to resolve any doubt it may have had, a finding of violation of Section 8(a)(5) was warranted. The Board concluded that consideration of these factors would require it to reenter the "thicket" of assessment of the employer's "good-faith," an inquiry "which we announced to the Supreme Court in [*National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575] * * * we had 'virtually abandoned * * * altogether'" (Pet. App. C, p. 63).

[5] The Board found, however, that the Company had violated Section 8(a)(3) of the Act by failing to reinstate two of the strikers. But the Board further found that, since these unfair labor practices occurred well after the start of the organizing campaign and under circumstances which would not lead other employees to view them as retribution for such activity, they did not preclude the conduct of a fair election (Pet. App. C, pp. 58–59).

2. WILDER

On October 12, 1965, representatives of the Textile Workers Union visited the plant of the Wilder Manufacturing Co. ("Wilder"), a manufacturer of cooking utensils. They presented the Company with eleven signed and two unsigned authorization cards,[6] stated that they represented a majority of Wilder's production and maintenance employees, and requested recognition.[7] Wilder official Walter Derse commented that some were unsigned. Union representative Cohen stated that two unsigned cards were included because the employees involved had indicated that they wanted to sign but the Union had not yet obtained their signatures. Cohen again requested recognition, but Derse replied that he had no authority to make that decision and that it could not be made until his brother, vice president Arthur F. Derse, Jr., returned to town (Pet. App. D, p. 120; A. 144–147, 160–162).

[6] The card was an application for membership in the Union and designated the Union as the employee's representative for purposes of collective bargaining (Pet. App. D, p. 128, n. 7; A. 187).

[7] There were 30 employees at Wilder's plant, eighteen of whom were included in the production and maintenance unit ultimately found appropriate by the trial examiner. The examiner rejected the Company's contention that seven technical employees also should be included in the unit (Pet. App. D, pp. 130–140).

Shortly after Cohen left, the eleven employees who had signed authorization cards left the plant and established a picket line[8] (Pet. App. D, p. 121). The next day Cohen telephoned Walter Derse, repeated his request for recognition, and stated that he had obtained employee signatures on additional authorization cards.[9] Derse reiterated that he could not answer the request until after he met with the other officers later that evening (*id.* at 143–144, n. 34; A. 153–154, 165).

Wilder's officers met during the evening of October 13. Walter Derse stated that only ten or eleven employees were on strike, adding that, since there were 30 employees at the plant, the Union could not possibly represent a majority. The officers decided not to recognize the Union (Pet. App. D, p. 121; A. 166–167). When the Union's further requests for recognition were denied, it filed unfair labor practices charges with the Board (Pet. App. D, p. 121).

The Board (Member Fanning dissenting), relying on its decision in *Linden*,[10] dismissed the complaint

[8] The picketing continued for approximately five months (Pet. App. D, p. 146).

[9] Two more employees signed cards that day and one of them joined the picket line (Pet. App. D, p. 129).

[10] In its initial decision in *Wilder*, issued prior to *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, the Board dismissed the complaint on the ground that there was no evidence that the Company's refusal to bargain had been in bad faith (Pet. App. D, p. 122). The court of appeals remanded the case to the Board for reconsideration in light of *Gissel* (Pet. App. E, pp. 160–164). In its first supplemental decision, the Board found an unlawful refusal to bargain on the ground that the Company knew that the Union possessed

(Pet. App. G, pp. 178–193).[11] It reiterated that, "absent employer unfair labor practices, the objectives of our statute are best served by encouraging the parties to utilize our orderly election procedures to establish a reliable majority-support foundation for a bargaining relationship" (*id.* at 182; emphasis omitted).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals reversed the Board's rulings that, by requiring that the unions establish their majority status in an election, the employers had not unlawfully refused to bargain. It held that, "[w]hile * * * cards alone, or recognitional strikes and ambiguous utterances of the employer, do not necessarily provide such 'convincing evidence of majority support' so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid both any duty to bargain and any inquiry into the actuality of his doubt" (Pet. App. A, p. 47). The court remanded the

majority support and had no "genuine willingness * * * to resolve any lingering doubts * * * [through] the Board's election procedures" (Pet. App. F, pp. 169–170). After its decision in *Linden*, the Board issued a second supplemental decision in *Wilder*, reversing its earlier finding of an unlawful refusal to bargain (Pet. App. G, pp. 178–193).

[11] The complaint alleged a refusal to bargain, in violation of Section 8(a)(5) of the Act, and also alleged restraint and coercion, in violation of Section 8(a)(1). The Board's dismissal of the latter allegations (Pet. App. D, pp. 119, 125–128) is not in issue here.

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cases to the Board "to reconsider what option, consistent with the statute, it wishes to follow" (*id.* at 50).[12]

SUMMARY OF ARGUMENT

Under the doctrine of *Joy Silk Mills, Inc.*, 85 NLRB 1263, enforced, 185 F. 2d 732 (C.A.D.C.), certiorari denied, 341 U.S. 914, which the Board followed for many years, an employer could lawfully refuse to bargain with a union that claimed representative status on the basis of either authorization cards or some other means less reliable than a Board election, if he had a "good faith doubt" whether the union represented a majority of the employees in an appropriate unit. In *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, this Court sustained the Board's abandonment of the good faith doubt test in situations where the employer has committed serious unfair labor practices that impeded the election process. In the present cases, the Board has also abolished that test in situations where the employer has not interfered with the election process.

An employer may have many valid objections to recognizing a union on the basis of cards. An inquiry into his subjective motivation for refusing recognition is not likely to yield a reliable answer. Similar difficulties are encountered in attempting to ascertain whether the employer had knowledge "independently" of the cards that would confirm the union's majority status. As the court of appeals acknowledged, the fact that a majority of the employees strike and picket does not necessarily establish that they desire the union as their representative. For these reasons, the Board properly concluded that it should no longer inquire into an employer's good faith doubt of majority status, but should adopt a clear-cut rule; *i.e.*, if he has not prejudiced the conduct of a fair election by unfair labor practices and has not agreed to be bound by a voluntary method of determining the union's representative status, an employer does not violate Section 8(a)(5) of the Act merely by insisting that the union verify its majority in a Board election.

The Board's position harmonizes Section 8(a)(5) with the other provisions of the Act and effectuates its policies. In *Gissel*, this Court acknowledged the superiority of the election process and recognized that it is the preferred method of determining majority status. The Board's position encourages resolution of representation cases by this salutary means.

The issuance of bargaining orders based on card or picket line indications of majority support would tend to encourage picketing for recognition, contrary to the congressional objective reflected in Section 8(b)(7)(C) of the Act. This provision seeks to encourage

[12] The court indicated that (Pet. App. A, p. 47, n. 47):

> The Board might, in order to reduce litigation and delay in these matters, adopt the rule that an employer must, when presented with an authorization card majority, either recognize the union or, within a reasonable time, petition for a certification election. * * * Without such a *per se* rule, * * * the Board would have to use some version of the "independent knowledge" test [discussed *infra*, pp. 19, 21] it considers workable, in order to define those conditions where a failure of an employer to petition for an election would be a predicate for an 8(a)(5) bargaining order.

resort to the Board's election machinery, and correspondingly to limit resort to the coercive pressures of picketing, as the method for resolving questions of representation. Similarly, the Board's position encourages use of its election machinery to determine representation questions.

Finally, the Board's position is consistent with this Court's recognition in *Gissel* that there was a "category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not support a bargaining order." 395 U.S. at 615. If a bargaining order based on cards is not warranted even in some cases where the employer has committed independent unfair labor practices, it would be anomalous to hold that an order is nonetheless required where the employer has committed no unfair labor practices.

In directing the Board to adopt some version of the unworkable good faith or independent knowledge tests, and in suggesting that it promulgate a *per se* rule requiring the employer to file a petition for an election in every case in which he is confronted with a card or picket line showing of majority, the court of appeals impermissibly intruded upon "the Board's special function of applying the general provisions of the Act to the complexities of industrial life." *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236. Neither the language of the Act nor its legislative history reflects any congressional intention to impose a requirement that the employer file a petition for an election in order to avoid violation of

Section 8(a)(5). Moreover, contrary to the view of the court of appeals, to require the employer to petition for an election will not preclude litigation of significant differences between the parties, or prevent an employer from delaying resolution of the representation question, if he so desires.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT AN EMPLOYER WHO HAS NEITHER PREJUDICED THE HOLDING OF A FAIR ELECTION NOR AGREED TO A VOLUNTARY METHOD OF DETERMINING THE UNION'S MAJORITY STATUS NEED NOT BARGAIN WITH THE UNION UNTIL IT HAS VERIFIED ITS CARD OR PICKET LINE SHOWING OF EMPLOYEE SUPPORT IN A BOARD ELECTION

In *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, the Court sustained the Board's authority to require an employer to recognize and bargain with a union that based its claim to representative status solely on the possession of union authorization cards, where the employer had engaged in independent unfair labor practices that tended to preclude the holding of a fair election. The Court found it unnecessary to decide whether a bargaining order based on cards or some other showing of employee support other than certification in a Board election "is ever appropriate in cases where there is no interference with the election processes." *Id.* at 595; see also *id.* at 601, n. 18. That question is presented here.

The Board concluded on the basis of its past experience that, irrespective of whether he establishes a "good faith doubt" about the union's majority status,

an employer who has neither prejudiced the holding of a fair election by unfair labor practices nor agreed to a voluntary method of determining the union's majority status should not be obliged to bargain with a union until it has verified its card or picket line indication of employee support in a Board election. We show below that this conclusion constitutes a reasonable and proper interpretation of the statute.

1. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) provides, in pertinent part, that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit * * *." Section 9(c)(1) permits the employees, the union, or the employer to petition the Board for an election by a secret ballot to determine whether any individual or labor organization is the majority representative of a particular group of employees.

While a Board election is not the only means by which a union may establish its representative status (*Gissel, supra,* 395 U.S. at 596–597), under the *Joy Silk* doctrine,[13] which the Board followed for many years, an employer could lawfully refuse to bargain with a union claiming representative status on the basis of authorization cards, or some means other than a Board election, if he had a "good faith doubt"

[13] *Joy Silk Mills, Inc.*, 85 NLRB 1263, enforced, 185 F. 2d 732 (C.A.D.C.), certiorari denied, 341 U.S. 914.

whether the union represented a majority of the employees in an appropriate unit. A good faith doubt would ordinarily be imputed to the employer if he insisted that the union verify its majority claim in a Board election, and refrained from committing independent unfair labor practices that tended to undermine the union.[14] On the other hand, the Board would find a lack of good faith doubt and would enter a bargaining order where the employer had committed such unfair labor practices, or had rejected without any reason the union's recognition demand.[15]

The good faith doubt test was frequently criticized,[16] however, and the Board experienced considerable dif-

[14] See *Abinante & Nola Packing Co.*, 26 NLRB 1288, 1322–1323; *Roanoke Public Warehouse*, 72 NLRB 1281, 1282–1283; *Artcraft Hosiery Co.*, 78 NLRB 333, 334; *A. L. Gilbert Co.*, 110 NLRB 2067, 2069–2070.

The considerations prompting this conclusion were that the determination whether the union represents a majority of the employees in an appropriate unit frequently presents complex factual and legal issues; the election procedures of the Act provide a quick and dependable means of resolving those issues (see pp. 23–24, *infra*); and the employer would commit an independent violation of the Act if he recognized a minority union. See *Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731.

[15] *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (C.A. 2), certiorari denied, 304 U.S. 576; *Acme-Evans Co.*, 24 NLRB 71, 113–114, enforced, 130 F. 2d 477 (C.A. 7); *Trimfit of Cal., Inc.*, 101 NLRB 706, 708, enforced, 211 F. 2d 206 (C.A. 9); *Pyne Moulding Corp.*, 110 NLRB 1700, 1707–1708, enforced, 226 F. 2d 818 (C.A. 2); *Economy Food Center, Inc.*, 142 NLRB 901, 913–914, enforced, 333 F. 2d 468 (C.A. 7).

[16] One of the criticisms was that an employer's unfair labor practices did not necessarily show that he did not have a good faith doubt of majority, in that "[t]he fact of employer coer-

ficulty in its practical application. Accordingly, in *Aaron Brothers Co.*, 158 NLRB 1077, the Board announced that an employer "will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority." *Id.* at 1078. The Board added that it was the General Counsel who had to establish affirmatively the existence of bad faith on the part of the employer. *Id.* at 1079. Thus, the employer no longer had to present reasons for rejecting a bargaining demand and he would not be deemed to have acted in bad faith merely because he insisted on an election. Furthermore, the Board noted that not every unfair labor practice would result in a finding of bad faith and the issuance of a bargaining order.[17]

The Board stated during the oral argument in *Gissel*, that by then it "had virtually abandoned the *Joy Silk* doctrine altogether." 395 U.S. at 594. The Court observed in *Gissel* (*ibid.*):

> Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union.[18]

This principle was qualified by the "independent knowledge" exception, *i.e.*, "an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union." *Ibid.* (emphasis in original); see *Snow & Sons*, 134 NLRB 709, enforced, 308 F. 2d 687 (C.A. 9).[19]

In *Gissel*, this Court accepted the Board's abandonment of the good faith doubt test in situations where the employer committed serious unfair labor practices that impeded the election process. In the present cases, we submit, the Board has also properly

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cion may be as consistent with a desire to prevent the acquisition of majority status as with a purpose to destroy an existing majority." Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 855 (1967). The test was also criticized for being unworkable, necessitating inquiry into the employer's state of mind. See *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 206–208 (C.A. 2); Christensen & Christensen, *Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions under the N.L.R.A.*, 37 U. Chi. L. Rev. 411 (1970); Comment, *Employer "Good Faith Doubt,"* 116 U. Pa. L. Rev. 709 (1968).

[17] See *Hammond & Irving, Inc.*, 154 NLRB 1071; *Clermont's Inc.*, 154 NLRB 1397; *Hercules Packing Corp.*, 163 NLRB 264, enforced, 386 F. 2d 790 (C.A. 2).

[18] The Court also noted that "by no longer requiring an employer to show affirmative reasons for insisting on an election * * *," the Board had eliminated some First Amendment "problem areas." 395 U.S. at 617.

[19] In *Snow*, the employer, upon being presented with an apparent card majority, agreed to submit the cards to an impartial third party for authentication, but, after authentication, still refused recognition, claiming that he never considered the agreement binding.

ended reliance upon such subjective tests in situations where the employer has refrained from interfering with the election process.

2. An employer may have many valid objections to recognizing a union on the basis of cards.[20] An inquiry into whether an employer has declined card-based recognition because he does not trust cards or because he opposes unions is unlikely to yield a reliable answer,[21] for "[n]either the Board nor the courts can read the minds of men." *Joy Silk Mills, Inc.* v. *National Labor Relations Board,* 185 F. 2d 732, 742 (C.A.D.C.), certiorari denied, 341 U.S. 914.

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[20] The employer may believe that cards "cannot accurately reflect an employee's wishes, either because [he] * * * has not had a chance to present his views and thus a chance to insure that the employee choice was an informed one, or because the choice was the result of group pressures and not individual decision made in the privacy of a voting booth"; moreover, "cards are too often obtained through misrepresentation and coercion * * *." *Gissel, supra,* 395 U.S. at 602. See also Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. L. Rev. 38, 122 (1964); Comment, *Refusal-to-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice,* 33 U. Chi. L. Rev. 387, 389–392 (1966); Comment, *Union Authorization Cards,* 75 Yale L.J. 805, 823–831 (1966); *Gissel, supra,* 395 U.S. at 602, n. 19.

[21] For example, under the *Joy Silk* approach, an employer opposed to unions could mask his true motive merely by stating that he believes the cards are unreliable, while an employer who rejected the union's request without comment could be found "guilty" of a refusal to bargain even though he had in fact been motivated by a distrust of the cards.

Similar difficulties are encountered in attempting to ascertain whether the employer has knowledge "independently" of the cards that would confirm the union's majority status. As the court of appeals recognized, for example, the fact that a majority of the employees strike and picket does not necessarily establish that they desire the union as their representative.[22] Further probing of this question would require the Board to enter the "tangled thicket" (Pet. App. G, p. 182) of subjective motivation, which, as this Court observed in *Gissel,* involves "an endless and unreliable inquiry." 395 U.S. at 608.[23] Accordingly, as the Board here stated (Pet. App. C, p. 63):

> Unless, as in *Snow & Sons* [see p. 19, *supra,* n. 19], the employer has agreed to let its "knowledge" of majority status be established through a means other than a Board election, how are we to evaluate whether it "knows" or whether it "doubts" majority status? * * *

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[22] "Refusal to cross a picket line may reflect mere fear * * * [o]r it may reflect a respect for what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative" (Pet. App. A, p. 44, n. 44). See *National Labor Relations Board* v. *Union Carbide Corp.,* 440 F. 2d 54, 56 (C.A. 4), certiorari denied, 404 U.S. 826.

See also A. 129–131, 133–136, 140–141, 159–160, 168–169, 170–173; O'Connor, *Respecting Picket Lines; A Union View,* N.Y.U. 7th Conf. on Lab. 235, 257–258 (1954); Carney & Florsheim, *The Treatment of Refusals to Cross Picket Lines: "By-Paths and Indirect Crookt Ways,"* 55 Corn. L. Rev. 940, 940–941 (1970); cf. *New York Tel. Co.,* 89 NLRB 383.

[23] See Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The "Independent Knowledge" Standard,* 39 U. Chi. L. Rev. 314, 319–325 (1972).

For these reasons, the Board was warranted in concluding that it should no longer inquire whether an employer was motivated by a good faith doubt in rejecting a union's card or picket line indication of majority support,[24] and in adopting, instead, the clear-cut principle that an employer does not violate Section 8(a)(5) of the Act merely by insisting that the union verify its majority in a Board election, if he has neither prejudiced the conduct of a fair election by unfair labor practices nor agreed to be bound by a voluntary method of determining the union's representative status.[25]

[24] The court below correctly noted that the court decisions indicating that a strike supported by a majority of the employees in a unit undermines a good faith doubt of majority are distinguishable. See *National Labor Relations Board* v. *Harris-Woodson Co.*, 179 F. 2d 720 (C.A. 4) (recognitional strike in the context of a refusal to negotiate with a union already certified after a Board election); *National Labor Relations Board* v. *National Seal Corp.*, 127 F. 2d 776 (C.A. 2) (recognitional strike accompanied by independent unfair labor practices and anti-union animus of officers of predecessor corporation who were still in control). "There is no case holding that the statute requires the Board to use recognitional strikes as conclusive evidence" of majority support (Pet. App. A. p. 43). See also *National Labor Relations Board* v. *World Carpets of N.Y., Inc.*, 463 F. 2d 57, 61, n. 4 (C.A. 2).

[25] In order to encourage the parties to adhere to their voluntary agreements, the Board will continue to find a refusal to bargain in the situation presented in *Snow & Sons*, *supra* (see p. 19, *supra*, n. 19). That is, if an employer agrees to have majority status determined by a means other than a Board election, he may not disclaim that determination, and insist on a Board election, simply because he disagrees with the results of that determination (Pet. App. C, pp. 64–65). *Nation-Wide Plastics Co.*, 197 NLRB No. 136, 81 LRRM 1036; *Sullivan Elec. Co.*, 199 NLRB No. 97, 81 LRRM 1313, enforced, 479 F. 2d 1270 (C.A. 6); *Atlantic Tech. Servs. Corp.*, 202 NLRB No. 13, 82 LRRM 1467, enforced, 86 LRRM 2182 (C.A.D.C.).

3. This position harmonizes Section 8(a)(5) with the other provisions of the Act and effectuates its policies. In *Gissel*, the Court recognized the superiority of the election process: "[S]ecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." 395 U.S. at 602. The Board, too, has consistently maintained that its election procedures provide a better means of testing majority support than does a check of authorization cards. As the Board stated in *Aaron Brothers Co., supra,* 158 NLRB at 1079, n. 10, its objective has always been the utilization of

> the most reliable means available to ascertain the true desires of employees with respect to the selection of a collective bargaining representative. Where an employer has engaged in unfair labor practices, the results of a Board-conducted election are a less reliable indication of the true desires of employees than authorization cards, whereas in a situation free of such unlawful interference the converse is true.

As noted above (p. 16, *supra*) Section 9(c)(1) of the Act permits either the union or the employer to petition for an election, and, where no interference has occurred, an election can be held expeditiously.[26] The Board's present position encourages the resolution of representation questions by this salutary

[26] In contested representation cases, the median time between the filing of the petition and the decision of the regional director directing an election is about 45 days. *Thirty-Eighth Annual Report of the National Labor Relations Board* 13 (1973).

means.[27] On the other hand, where a fair election could be held, issuance of bargaining orders based on a card or picket line indication of majority support is likely to delay resolution of the representation question for a considerable period of time. Unfair labor practice proceedings, particularly where the validity of each card is contested, are generally far more protracted than representation proceedings.[28]

Moreover, the issuance of such bargaining orders would tend to encourage picketing for recognition, contrary to the congressional objective reflected in the restriction of such picketing in Section 8(b)(7)

[27] An election provides an opportunity for the employer to exercise his protected right (under Section 8(c) of the Act, 29 U.S.C. 158(c), and the First Amendment) to influence the vote of his employees through non-coercive speech. See *Gissel*, *supra*, 395 U.S. at 616–619; *Thomas* v. *Collins*, 323 U.S. 516, 537–538; *National Labor Relations Board* v. *Virginia Elec. & Power Co.*, 314 U.S. 469; Pet. App. A, p. 39, n. 32. "[A]n employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice." *Excelsior Underwear Inc.*, 156 NLRB 1236, 1240. Moreover, "an election is a solemn * * * occasion, conducted under safeguards to voluntary choice * * *. A petition or a public meeting—in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth." *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 99–100.

[28] The Board's records show that in fiscal 1973 the median time between the filing of an unfair labor practice charge and a Board decision in a contested case was 356 days, Cf. *Gissel*, *supra*, 395 U.S. at 611, n. 30. In *Linden*, the time between the filing of the charge and the Board's decision was about four and one-half years (A. 1–2), and in *Wilder* it was about six and one-half years (A. 55–56).

(C), 29 U.S.C. 158(b)(7)(C). This section effectuates the federal policy of ensuring employees free choice in the selection or rejection of a bargaining representative (see *National Labor Relations Board* v. *Local 542, Operating Engineers*, 331 F. 2d 99, 107 (C.A. 3), certiorari denied, 379 U.S. 889) by encouraging prompt use of the Board's election machinery, and, consequently, limiting resort to the coercive pressures of picketing, as the method for resolving questions of representation. See *Department & Specialty Store Employees' Union, Local 1265* v. *Brown*, 284 F. 2d 619, 626 (C.A. 9), certiorari denied, 366 U.S. 934; *Dayton Typographical Union No. 57* v. *National Labor Relations Board*, 326 F. 2d 634, 646 (C.A.D.C.). The Board's position in the instant cases similarly encourages use of the Board's election machinery to determine representation questions, and seeks to avoid the need to determine them in the context of ongoing industrial strife.[29]

[29] Contrary to the Unions' contention (Br. in Opp., pp. 5–7), the Board's position does not ignore Congress' rejection, in 1947, of an amendment that would have permitted "the Board to find a refusal-to-bargain violation only where an employer had failed to bargain with a union 'currently recognized by the employer or certified as such [through an election] under section 9.'" *Gissel*, *supra*, 395 U.S. at 598. Where the employer has engaged in conduct which precludes the holding of a fair election or where he reneges on an agreement to have the union's status determined by another method (p. 22, *supra*, n. 25), the Board will find a bargaining obligation based on a showing of majority status other than through a Board election.

Indeed, the Unions concede (Br. in Opp., pp. 8–9, n. 3) that Congress did not answer the question whether employers have a duty to recognize a union which presents "authorization cards

4. In *Gissel,* while sustaining the Board's authority to issue a bargaining order where the union had shown majority status through cards and the employer had engaged in independent unfair labor practices which precluded a fair election, the Court recognized that there was a "category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." 395 U.S. at 615. If a bargaining order based on cards is not warranted even in some cases where the employer has committed independent unfair labor practices, it would be anomalous to hold that one is nonetheless required where the employer has committed no unfair labor practices.[30] The Board's present interpretation of Section 8(a)(5) avoids this anomaly.[31]

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backed by recognitional strikes by the card signers," and they add that this "question is intensely practical and has not been dealt with in terms by Congress" (*id.* at 8–9). Accordingly, the area is one "[w]here Congress has in the statute given the Board a question to answer, [and] the courts will give respect to that answer * * *." *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, 499.

[30] Indeed, in *Linden*, the employer committed an independent unfair labor practice which the Board found was insufficient to warrant a bargaining order under the *Gissel* standards (p. 8, *supra*, n. 5). Yet, under the decision of the court of appeals, a bargaining order might nonetheless be required.

[31] It is also consistent with the Court's answer in *Gissel* to the employers' contention that predicating a bargaining order on cards gives them a Hobson's choice. The employers contended that, "if they do not make an immediate, personal investigation into possible solicitation irregularities * * *, they will have unlawfully refused to bargain for failure to have a good faith doubt of the union's majority; and if they do make such an investigation, their efforts at polling and interrogation will constitute an unfair labor practice in violation of § 8(a)(1) and they will again be ordered to bargain." 395 U.S. at 609. The Court responded: "As we have pointed out, however, an employer is not obligated to accept a card check as proof of majority status, under the Board's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status [citing *Aaron Brothers Co., supra*]* **." *Ibid.* See also *id.* at 600; "[W]e agree that the policies reflected in § 9(c)(1)(B) [pp. 3–4, *supra*] fully support the Board's present administration of the Act * * *; for an employer can insist on a secret ballot election, unless, in the words of the Board, he engages 'in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election.'"

5. The court of appeals recognized that "[i]t is certainly permissible for the Board to avoid encouraging recognitional striking and picketing by refusing to regard them as an independent and conclusive method of demonstrating a majority * * *" (Pet. App. A, p. 44), and that, because of the "difficulties in determining the state of past employer knowledge * * *" (*id.* at 45), it is "conceivable that a restriction of 'independent knowledge' to an agreement to abide by an authentication would be acceptable * * *" (*id.* at 47). The court concluded, however, that the Board could not so restrict the "independent knowledge" test without substituting the requirement that the employer "evidence his good faith doubt as to majority status * * * by petitioning for an election" (*id.* at 47) or by voicing "consent to abide by an election ordered on union petition" (*id.* at 46, n. 46). The court's reasons for this conclusion do not withstand analysis.

First, noting that Congress in 1947 authorized employers to file their own representation petitions (Section 9(c)(1)(B), pp. 3–4, 16, *supra*), the court inferred that the premise of this provision was that "employers could 'test out their doubts as to a union's majority status' by petitioning for an election" (Pet. App. A, p. 47). The legislative history of Section 9(c)(1)(B) shows, however, that this provision was intended merely to eliminate the "discrimination" against employers which had existed under the prior Board rules, which permitted a union to petition for an election even though it alone was seeking recognition but permitted an employer to do so only when confronted with claims by two or more unions.[32] There is no indication that this provision was intended to go further and require an employer who had doubts as to a union's majority status to petition for an election, in order to avoid a refusal-to-bargain finding.

Second, the court asserted that, "[w]hen an employer petitions for or consents to [an] election, the election process is expedited" (Pet. App. A, p. 48), since the employer "would be required to define the appropriate unit and therefore would not be entitled, as an objecting party, to request a hearing" or to "object to a sufficient (30%) showing of majority support" (Pet. App. A, p. 48, n. 48). But, as there may be more than one appropriate unit for bargaining purposes, the employer and the union may have legitimate differences of opinion over the unit in which an election should be held.

[32] See S. Rep. No. 105, 80th Cong., 1st Sess., Part 1, pp. 10–11; 93 Cong. Rec. 3838.

For example, the union may have requested recognition in a small unit, whereas the employer may prefer a larger, but still appropriate, unit. Should the employer be forced to file a petition, he would doubtless pick the larger unit. It is unlikely that the union would accept that unit, in which case, the employer's petition would be dismissed.[33] Accordingly, the union, if it desired an election in the smaller unit, would still have to file its own petition, and the employer would remain free to contest the appropriateness of the unit sought by the union. Moreover, even if the disparity between the units sought by the employer and the union was not sufficient to require dismissal of the employer petition, the time saving envisioned by the court of appeals would occur only if the union were willing to resolve in the employer's favor all questions concerning whether or not particular individuals or jobs fell within the unit.[34]

[33] Section 9(c)(1)(B) of the Act states that an employer petition must allege that "one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a)." Since the "question of representation * * * is raised only by an affirmative claim of a labor organization that it represents a majority of employees in an appropriate unit," the Board will dismiss the employer's petition if there is a significant discrepancy between the unit set forth therein and the unit for which the union has requested recognition. *Amperex Electronic Corp.*, 109 NLRB 353, 354. Accord, *Wm. Wood Bakery, Inc.*, 97 NLRB 122; *Bowman Bldg. Prods. Div.* 170 NLRB; *Aerojet-General Corp.*, 185 NLRB 794.

[34] For example, in *Wilder*, the employer contended that seven technical employees should be included in the unit (p. 9, *supra*, n. 7). It is unlikely that the Union, without a contest, would have accepted those seven employees, for they could have spelled the difference between victory and defeat.

Thus, contrary to the view of the court of appeals, to require the employer to petition for a Board election would not preclude litigation of significant differences between the parties, nor prevent an employer who sought to delay resolution of the representation question from drawing his petition so as to elicit objections from the union.[35] Moreover, if Congress had intended to impose the requirement that the employer must file a petition for an election in order to avoid violation of Section 8(a)(5), it seems reasonable to suppose that it would have said so. Neither the language of the Act nor its history reflects any such intention.

In sum, the Board properly concluded that an employer who, like Linden and Wilder here, has not impeded the conduct of a fair election and has not agreed to a voluntary method of resolving the union's majority status does not violate Section 8(a)(5) of the Act merely by insisting that the union verify its majority in a Board election. The Board's position "encourage[s] the principle of voluntarism but at the same time insure[s] that when voluntarism fails the 'preferred route' of secret ballot elections is available

[35] The court erred in suggesting that an employer petition would obviate litigation over the sufficiency of the union's showing of interest. While a union petition, unlike an employer petition, must be backed by a 30 percent showing of employee interest (p. 6, *supra*, n. 4), the sufficiency of such a showing is not litigable by the parties. *National Labor Relations Board* v. *Savair Mfg. Co.*, 414 U.S. 270, 287, n. 6 (White, J., dissenting).

to those who do not find any alternative route acceptable" (Pet. App. C, p. 64). The Board is entrusted with primary responsibility for balancing the conflicting rights and obligations of the parties under the statute,[36] and the accommodation it made here is reasonable. In directing the Board either to adopt a *per se* rule requiring the employer to file a petition for an election in every case in which he is confronted with a card or picket line showing of majority, or to apply some version of the concededly unworkable good faith or independent knowledge tests (p. 12, *supra*, n. 12), the court of appeals impermissibly intruded upon "the Board's special function of applying the general provisions of the Act to the complexities of industrial life." *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236.

[36] "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, 96.

CONCLUSION

The judgment of the court of appeals should be reversed and the cases should be remanded to that court with directions to affirm the Board's orders dismissing the refusal to bargain allegations of the complaints.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1231 & 73-1234

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
AND
TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRUCK DRIVERS UNION LOCAL NO. 413, AND TEXTILE WORKERS UNION,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNION RESPONDENTS

The opinions below, the basis of this Court's jurisdiction, and the statutory provisions involved are set out at pp. 2-3, of the brief for the petitioner in No. 73-1231 (Linden Lumber Division, Summer & Co.), and at pp. 1-4, of the brief for the petitioner in No. 73-1234 (the National Labor Relations Board).[1]

[1] Since they raised the same question in essentially parallel settings, the Court of Appeals consolidated two petitions for review of

QUESTION PRESENTED

Sections 8(a)(5) & 9(a) of the National Labor Relations Act provide that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representative * * * designated or selected * * * by the majority of the employees in a[n] * * * appropriate * * * unit." The question before this Court is:

Whether an employer who does not commit substantial violations of §§ 8(a)(1)-(4) has an absolute privilege to reject a request for bargaining made by a union that offers to prove that it has been "designated or selected" by a "majority" through a method other than petitioning for and securing a Board certification.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

The question of statutory construction presented by these cases is distinctive in that it is of exceedingly narrow compass, and, that it has been squarely answered by Congress.

In 1972 (37 years after §§ 8(a)(5) & 9(a) of the National

separate Board decisions, one filed by Truck Drivers Union Local No. 413 and involving Linden Lumber Division, the other filed by the Textile Workers Union and involving the Wilder Mfg. Co. (NLRB Pet. App. p. 24.) Both petitioners seek reversal of the resulting decision of the court below. We therefore respond to both in this brief.

[2] Since, as we show below, the Court of Appeals did not determine when an employer must bargain with a union that has not petitioned for and secured a Board certification, but simply held that the privilege not to do so is not absolute, the question presented here is wholly abstract. For this reason and since the Board's

Labor Relations Act[3] were enacted in precisely their present form), the National Labor Relations Board, in the decisions under review,[4] and after a series of vacillations,[5] squarely adopted its "'voluntarist' view of the duty to bargain," *viz*, that "absent unfair labor practices or an agreement to determine majority status through means other than an election, such as a poll, the employer has no duty to recognize the union," (NLRB Pet. App. p. 35). In other words, the Board's current position is that an employer who does not commit substantial violations of §§ 8(a)(1)-(4) has an absolute privilege to reject a request for bargaining made by a union that offers to prove that it has been "designated or selected" by a "majority" (§§ 8(a)(5) & 9(a)) through a method other than petition-

statement of the case (Bd. Br. pp. 5-11) follows the outline of the facts as stated in its decisions (which the Unions accepted in the court below), we do not restate the case.

[3] Section 8(a)(5) of the Act, provides:

> "It shall be an unfair labor practice for an employer * * * to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Section 9(a), in turn, states:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *"

[4] *Linden Lumber Co. & Truck Drivers Local No. 413* (NLRB Pet. App. pp. 51-118), and *Wilder Mfg. Co. & Textile Workers Union of America (Second Supplemental Decision)* (NLRB Pet. App. pp. 178-193).

[5] See NLRB Pet. App. pp. 25-35 detailing the tortuous history of the *Wilder* litigation.

ing for and securing a Board certification.[6]

Logically, the issue presented to the Board by the §8(a)(5) charges filed by the Unions has two components: Does an employer who has not committed other unfair labor practices ever have an obligation to bargain with a union that has not secured a Board certification? If there is such an obligation, under what circumstances does it attach? The Board answered the threshold question in the negative by ruling that the employer has an absolute privilege to refuse to bargain, and therefore did not treat with the second, and ultimate, question. (Nevertheless the Board seeks to prejudice consideration of the adequacy of its answer to the first question by urging that it is not possible to provide a rational answer to that latter question. (Bd. Br. pp. 20-22.) But see *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 198, rejecting a similar Board argument, discussed at pp. 44 *infra*.)

On petitions to review, the Court of Appeals held that the Act does not provide employers the absolute privilege the Board would grant them. (NLRB Pet. App. p. 50.) That court, however, did not enter bargaining orders directed to the Employers, nor did it require the Board to do so; instead, these cases were "remand[ed] to the Board to reconsider what options consistent with the statute it wishes to follow," (NLRB Pet. App. p. 50). The petition for certiorari by the Board and Linden Lumber followed. Thus, the issue before this Court, is whether, as the Board claims, its "'voluntarist' view of the duty to bargain" is correct, or whether as the Court of Appeals held, that view "is inconsistent with the Act," (Pet. App. p. 50).

[6] For simplicity's sake we shall on occasion refer to the Board's present practice as its "absolute privilege" position, or its "'voluntarist' view of the duty to bargain," with the understanding that those short-hand terms have the meaning stated in the text.

In the body of the argument we demonstrate first that it was settled prior to 1947 that employers do not have an absolute privilege to reject a request for bargaining by a union that has not petitioned for and secured a Board certification (pp. 5-15); second, that the 1947 Congress in enacting the Taft-Hartley amendments to the Wagner Act, after considering whether to grant that privilege, chose instead to maintain the preexisting law (pp. 15-25); and third, that this Court's post-1947 decisions in *Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62 (which the petitioners ignore even though it is very much in point) and *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (upon which they erroneously rely) respect the judgment of the 1947 Congress to ratify the Wagner Act law as to the obligation of an employer to recognize a union "designated or selected" by a "majority" (§§8(a)(5) & 9(a)) (pp. 25-45). In other words, we show that the question here is, not, as the Board claims, one which "Congress has in the statute given the Board to answer." (Cf. Bd. Br. pp. 25-26 n. 29 citing *Labor Board* v. *Insurance Agents International*, 361 U.S. 477, 489.) For, Congress itself has squarely answered that question so as to preclude adoption of the Board's "absolute privilege" position. Accordingly, here, as in *Insurance Agents* the Board's "answer" is not entitled to "respect" from this Court. "Congress' * * * policy cannot be de-

feated by the Board's policy." (*Local 1424 Machinists* v. *Labor Board*, 362 U.S. 411, 428.)

ARGUMENT

1. In 1935 Congress declared "the policy of the United States" to be "encourag[ement of] the practice and procedure of collective bargaining." To further this policy, § 7 guaranteed employees "the right • • • to bargain collectively through representatives of their own choosing." Sections 8(5) & 9(a), in turn, imposed on employers the duty which effectuated this employee right; they declared it to be an unfair labor practice "to refuse to bargain collectively with the representative • • • designated or selected • • • by the majority of the employees in a[n] • • • appropriate • • • unit."[7] Since Congress had not:

> "specif[ied] precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented 'convincing evidence of majority support.' Almost from inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation." (*NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 598; footnote omitted.)

The original understanding (cf. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315) was succinctly stated by Judge Charles Clark in the leading case of *NLRB* v. *Dahlstrom Metallic Door Co.*, 112 F.2d 756, 757 (C.A.2):

[7] In 1947, Congress, while retaining the language of §§ 8(5) & 9(a) *in haec verba*, changed the designation of § 8(5) to § 8(a)(5).

> "The contention that bargaining was not mandatory until the Board had accredited Local 307 as bargaining agent is frivolous. An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support. National Labor Relations Board v. Remington Rand, Inc., 2 Cir., 94 F.2d 862, 868, certiorari denied 304 U.S. 575, 585. We do not mean that respondent had to bargain with anyone claiming to represent a majority, but adequate proof tendered by the claimant could not in good faith be ignored."

See also, e.g., *Burnside Steel Foundry Co.*, 7 NLRB 714, 715:

> "The [Union] attempted in good faith to convince the [Employer] that it represented a majority of the employees. Its proposal [that its membership cards be checked against the pay roll] was apparently a fair, practicable, and not unduly burdensome method of substantiating its contention. The [Employer's] officials simply rejected it, making no counterproposal other than that the [Union] obtain the Board's certification. • • • [T]hey indicated no respect in which they considered the method proposed • • • unsatisfactory. In the circumstances • • • the Employer's duty to bargain collectively with the [Union] included the duty to cooperate with the [Union] to a reasonable extent, in an inquiry as to that organization's claim to have been designated as exclusive bargaining representative."

Indeed, prior to 1947 the Board had made it plain that even where the employer does indicate "a respect in which [he] consider[s] the [union's proof] unsatisfactory," he may not rest on the "counterproposal • • • that the [union] obtain the Board's certification." (Cf. *Burnside*, *supra*).

Where that is the situation the employer has an affirmative obligation to come forward with a "reasonable proposal" which would "facilitate a speedy resolution of [his] doubts" and would not "delay collective bargaining." (*Roanoke Public Warehouse*, 72 NLRB 1281, 1282)[8]

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[8] While the *Roanoke* Board found no § 8(5) violation on the ground that in that case (as contrasted to these) the employer did fulfill that affirmative obligation, it took pains to reject the "absolute privilege" position the present Board argues for here:

> "On this particular record, the employer's scepticism as to whether the proffered membership cards reflected the desires of a majority of his employees is insufficient evidence of bad faith upon which to found a finding of refusal to bargain. He agreed to be bound by the results of an expedited *consent* election.
>
> • • • •
>
> "The conclusion reached on the particular facts in this case should not be construed to mean that an employer may always demand an election or certification when faced with a demand for bargaining rights by a representative claiming to represent a majority of his employees • • •. The obligation imposed by the Act is to bargain with the representative of a majority of the employees. If the majority is present, the obligation exists, subject to the possibility that a particular employer may, in good faith, ask for reasonable proof of the representative's asserted majority status." (*Id.* at 1282 & n. 3; emphasis in original)

Where a union must petition for certification the full panoply of procedures available to the employer is an initial hearing, the election, the filing of and decision upon objections, an appeal to the Board, a refusal to bargain to test the certification, an unfair labor practice hearing, another appeal to the Board, and an appeal to the courts. As the Board itself has recognized, in that context an employer may therefore secure "delay of 2 or more years in the fulfillment of a statutory bargaining obligation." (*Ex-Cell-O Corp.*, 185 NLRB 107, 108.) In contrast, a consent election agreement dispenses with the need for an initial hearing and provides a substantial safeguard against dilatory tactics by providing that the decision of the Board's Regional Director, who conducts the election, shall be "final." (See 29 C.F.R. § 102.62.)

To be sure, as this Court added in *Gissel*, 395 U.S. at 597 n. 11:

> "The right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union's majority status, even if in fact the Union did represent a majority, was [also] recognized early in the administration of the Act, see NLRB v. Remington Rand, Inc., 94 F.2d 862, 868, (CA 2d Cir.), cert. denied, 304 U.S. 576."

But that is of no aid to the Board here. For, as Judge Learned Hand stated in *Remington Rand*, 94 F.2d at 868-869:

> "The [employer] answers [a refusal to recognize

The Court of Appeals noted:

> "Board member Fanning, dissenting, in the Second Supplemental Decision in *Wilder*, observed that:
>
> '[O]ur experience in conducting elections demonstrates that where employers are willing to go to an election, the election is held more expeditiously and with far less likelihood of interference in the conduct of the election than is the case where either party has to be forced to an election.'
>
> "One commentator, on the basis of an interview with Martin Schneid, Assistant to the Regional Director, NLRB, has concluded that 'an election contested through submission of objections at a pre-election hearing is likely to take sixty to sixty-three days between petition and balloting, while a consent election, in which the hearing is waived, is likely to take only twenty to twenty-three days.' Comment, [39 U. Chi. L. Rev.] at 325 n. 48." (NLRB Pet. App. p. 48, n. 48)

> charges by asserting] that it had no official or conclusive information that the Joint Board was the duly accredited bargaining representative of the men, and that it could not have had until the Labor Board had itself so decided. The Labor Board does indeed have that power, section 9(c), 29 U.S.C.A. § 159(c), and when there is a real doubt, we may assume arguendo that the employer need not decide the issue at his peril; * * *. If he cannot satisfy himself of their credentials, and if he cannot by informal appeal to the Labor Board invoke its power, it would certainly seem that he should be free not to recognize; * * * but from that immunity it does not in the least follow that [the employer] need be satisfied with no evidence except the Board's certificate; it may be entirely apparent from other sources that [the union seeking recognition] really represents the majority * * *. [Where an employer makes] no effort to learn the facts [he takes] the chance of what they may be."

In sum, as of 1947, it was settled that §§ 8(5) & 9(a) impose on an employer who receives a request to bargain from a union that claims majority status and offers to substantiate its claim by a method other than petitioning for a Board certification, the obligation "to learn the facts" (*Remington Rand, supra*), through a method that "facilitate[s] a speedy resolution of [his] doubts" (*Roanoke Public Warehouse, supra*), and to bargain if the union is able to substantiate its claim through "convincing evidence of majority support" (*Dahlstrom Metallic Door, supra*); the employer does not have the privilege of responding by requiring "that the [union] obtain the Board's certification," (*Burnside Steel Foundry Co., supra*). And, the foregoing rule of law applied whether or not the employer

committed other unfair labor practices. For, in both *Dahlstrom Metallic Door* and *Roanoke Public Warehouse* the employer had not violated §§ 8(1)-(4).

Thus, while the Wagner Act precedents speak in terms of a "good faith doubt" test (*Gissel*, 395 U.S. at 597 n. 11), that test was not entirely or even predominately subjective; at its core were the objective requirements just stated. To be sure, as is readily apparent from their language, the pre-1947 cases did not fully flesh out the precise content of the employer's §§ 8(5) & 9(a) obligation. But those precedents were uniform in their appreciation that the Wagner Act did not grant employers an absolute privilege to refuse to bargain unless the union petitions for and secures a Board certification. That is why the affirmation of that law by the 1947 Congress (see pp. 15-25 *infra*) proves that the Board's current "'voluntarist' view of the duty to bargain" is wrong, but does not dispose of the question which the Board's present practice pretermits—the precise circumstances under which the duty to bargain with a union which claims to have been "designated or selected" by a "majority" attaches. (Compare pp. 4-5 *supra*.) Rather, as to the latter question the course of prior events simply establishes that the Board may not give such limited effect to the employer obligation imposed by §§ 8(a)(5) and 9(a) so as to require in practical terms that unions must petition for and secure a Board certification.

The original understanding of what §§ 8(a)(5) & 9(a) are all about takes full account of the 1935 Congress' decision, embodied in § 9(c), to provide a procedure by which

unions may petition for a Board certification, and the Board's decision, in *Cudahy Packing Co.* 13 NLRB 526, to *certify* only a union which has prevailed in a Board-conducted election. Sections 8(a)(5) & 9(a), on their face, make it plain that utilization of that procedure is not mandatory at the whim of employers. For, the "obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace." (*IUE* v. *NLRB*, 426 F.2d 1243, 1249 cert. denied 400 U.S. 950.) Thus, prompt initiation of collective bargaining is necessary to fulfill the ultimate aim of the Act—to "encourage the practice and procedure of collective bargaining" (§ 1). But, as already noted (pp. 8-9 n. 8), union certification petitions are the most time-consuming method for initiating bargaining. And, the passage of time discourages the "practice and procedure of collective bargaining:"

> "Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. • • • Thus the employer may reap [two] benefit[s] from his original refusal to comply with the law • • • an avoidance of bargaining [during the pendency of the case; and] he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively." (*IUE* v. *NLRB*, 426 F.2d at 1249)

That is why Congress imposed upon employers a duty to recognize the union "designated or selected" by the

"majority" (§§ 8(a)(5) & 9(a)), without "specifying precisely how that representative is to be chosen" (*Gissel*, 395 U.S. at 598), and not a duty only to recognize unions that have petitioned for and secured a Board certification. And that is why the Act requires unions to initiate the formal § 9(c) certification procedures as a condition precedent to bargaining only in those cases in which there is a "bona fide dispute as to the existence of the required majority of eligible employees" (*Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 69); *viz*, only where those protracted procedures are necessary to enable the Board to resolve a substantial question as to the employees' desires.

The Board's opinions in these cases do not discuss the pre-1947 law. However, the Board's brief, relying on two Wagner Act cases, takes issue with this Court's summary of that law in *Gissel*, 395 U.S. at 598 (see p. 6 *supra*), arguing:

> "[A]n employer could lawfully refuse to bargain with a union claiming representative status • • • if he had a 'good faith doubt' whether the union represented a majority of the employees in an appropriate unit. A good faith doubt would ordinarily be imputed to the employer if he insisted that the union verify its majority claim in a Board election, and refrained from committing independent unfair labor practices that tended to undermine the union." (Bd. Br. pp. 16-17.)

Neither of the cited cases (Bd. Br. p. 17 n. 14) supports that assertion. We have already discussed *Roanoke Public Warehouse*, 72 NLRB 128 and shown that it is of no aid to the Board here. (P. 8 *supra*.) In *Abinante & Nola Packing Co.*, 26 NLRB 1288, 1322-1323, two unions, one of whom

had previously been recognized, were actively seeking representative status. The Board "dismiss[ed] the allegation of the complaint that the [employers] refused to bargain collectively" since they:

> "were confronted with the fact that a substantial number of employees were shifting their allegiance back and forth between the two labor organizations. We think that in the circumstances of this case they did not act unreasonably in rejecting the suggestion that the question concerning representation be determined on the basis of the designations alone and in insisting that they would not bargain with Local 1-6 unless and until the Board certified that organization." (*Id.* at 1322-1323.)

That holding does not support the assertion in the Board's brief. It is simply an application of the proposition stated in *Dahlstrom Metallic Door*, 112 F.2d at 679, that the employer's duty to bargain is contingent upon production by the union of "convincing evidence of majority support," predicated on the conclusion that card designations are not such evidence where "a substantial number of employees [are] shifting their allegiance back and forth between two labor organizations." Indeed, as noted below (p. 17), throughout the Wagner Act period, the Board recognized the particular problem produced by cases such as *Abinante & Nola Packing Co.*, and distinguished between cases in which two unions were seeking bargaining rights and those in which only one union did so, by granting employers the right to petition for a Board election in the first instance but not the second. The two Wagner Board precedents cited by Linden Lumber (Co. Br. p. 9) in support of its

argument are also beside the point. *Cudahy Packing Co.*, 13 NLRB 526 dealt only with the procedures to be followed after a certification petition has been filed and not with the law as to when unions must secure a certification. (See *Gissel*, 395 U.S. at 598.) And, *Midwest Piping and Supply Co.*, 63 NLRB 1060, like *Abinante & Nola*, was a case in which two unions were vying for representation rights.

2. The established law as to the obligations imposed by §§ 8(5) & 9(a) was ratified in the Taft-Hartley amendments to the Wagner Act. In the Conference to reconcile the House and Senate bills the House receded from its proposal to limit that obligation only to "an employer [who] had failed to bargain with a union 'currently recognized by the employer or certified as such [through an election] under section 9.' Section 8(a)(5) of H.R. 3020, 80th Cong., 1st Sess. (1947)," (*Gissel*, 395 U.S. at 598), in favor of the Senate bill which proposed reenactment of §§ 8(5) & 9(a) without modification. The Conference Committee explained that:

> "The conference agreement * * * follows the provisions of existing law * * * in the case of section 8(5) * * * which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)." (H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong. 1st Sess. p. 41, 1 Legislative History of the Labor Management Relations Act (G.P.O., 1948), p. 545.)

We have just seen that in conformity with the plain language of §§ 8(5) & 9(a) the then "existing law" was that an employer does have an obligation to bargain with a

union" designated or selected" by the "majority," and does not have an absolute privilege to delay the prompt initiation of collective bargaining by requiring the union to petition for and secure a Board certification. (Pp. 5-15 *supra.*) It is difficult to conceive of a more direct manifestation of a Congressional intent to continue to impose on employers that substantive obligation and to continue to deny to employers that privilege. (Compare *Labor Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366.) Again, (compare p. 13), the Board opinions in these cases do not notice this authoritative guide to decision. And, the 1947 amendments to which the petitioners point serve only to confirm the lesson we draw from the legislative history.

As Linden Lumber notes (Co. Br. p. 9), the 1947 Congress did amend "§ 9(c) to make elections the sole basis for *certification.*" (*Gissel,* 395 U.S. at 598, emphasis in the original.) The Court has already found without merit the suggestion that a "change was wrought" thereby in the duty to recognize uncertified unions. (*Id.*) That amendment merely approved the practice the Board has adopted in *Cudahy Packing* and followed thereafter. (P. 12 *supra.*) For, a "*certified* union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order and which, Congress could determine, should not be dispensed unless a union has survived the crucible of a secret ballot election." (395 U.S. at 598-599; emphasis added.)

Moreover, neither § (9)(c)(1)(B),[9] nor anything else in

[9] "Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

the 1947 amendments, imposed on unions the obligation to secure a certification simply because the employer refuses to accept alternative proof of majority status. (Cf. Co. Br. pp. 9, 18-19; Bd. Br. pp. 28-29.) What § 9(c)(1)(B) does do is enable an employer who is faced with a demand for recognition to file his own petition for an election (which he was able to do under prior law only where more than one union was seeking recognition, see *Gissel,* 395 U.S. at 599, n. 15).

The court below suggested that § 9(c)(1)(B) could be read as privileging the refusal to bargain of an employer who exercises his right to file a § 9(c)(1)(B) petition. (NLRB Pet. App. pp. 45-49.) But even that suggestion runs counter to the authoritative explanation of the limited purpose of § 9(c)(1)(B):

> "The present Board rules [which allow employers to file election petitions only if there are two unions seeking recognition] discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent the employees are really not the choice of the majority." S. Rep. No. 105, 80th Cong., 1st Sess., 10-11; 1 Leg. Hist. of the LMRA, 416.[10]

• • •

"by an employer, alleging that one or more individuals or labor organizations, have presented to him a claim to be recognized as the representative defined in section 9(a);

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice."

[10] The Board attacks the lower court's "premise" that § 9(c)(1)

Thus, § 9(c)(1)(B) appears to grant an employer who has "*reasonable grounds* for believing that labor organizations claiming to represent the employees are really not the choice of the majority" (*viz.*, an employer who has complied with his obligations under §§ 8(a)(5) & 9(a) with the result that the union claiming to be the representative has not been able to provide him with "convincing evidence of majority support" yet refuses to either renounce its claim or file a certification petition (see pp. 5-15 *supra*)) a practical means for securing prompt resolution of the ensuing substantial representation question; it is not a means by which employers who lack such grounds may escape those obligations."

(B) was intended to enable employers to "test out their doubts as to a union's majority status." (Bd. Br. p. 28). But that premise is nothing but a quotation from this Court's opinion in *Gissel*, 395 U.S. at 599 (and was set off by quotation marks). Moreover, while the Board notes various stratagems whereby an employer who files a petition could frustrate a prompt election (Bd. Br. pp. 28-29), and thereby provides a predicate in addition to the explicit legislative history for our view (contrary to that of the court below) that § 9(c)(1)(B) is of aid only to an employer who has "reasonable grounds" for his refusal to bargain, no answer is provided to the Court of Appeal's suggestion that "[w]hen an employer • • • consents to [an] election, the election process is expedited." (Cf. Bd. Br. p. 28; compare pp. 8-9 n. 8 *supra*.)

[11] The foregoing analysis of § 9(c)(1)(B) is entirely consistent with this Court's opinion in *Gissel* which states:

> "The employers rely finally on the addition to § 9(c) of subparagraph (B), • • • That provision was not added, as the employers assert, to give them an absolute right to an election at any time; rather, it was intended, as the legislative history indicates, to allow them, after being asked to bargain, to test out their doubts as to union's majority in a secret election which they would then presumably not cause to be set aside by illegal anti-union activity. We agree with the Board's assertion here that there is no suggestion that Congress intended § 9(c)(1)(B) to relieve any employer of his § 8(a)(5) bargaining obligation where, without good faith, he engaged in unfair labor practices disruptive of the Board's election machinery. And we agree that the policies reflected in § 9(c)(1)(B) fully support the Board's present administration of the Act • • • for an employer can insist on a secret ballot election, unless, in the words of the Board, he engages 'in contemporaneous unfair labor practices likely to destroy the union majority and seriously impede the election." (395 U.S. at 599-600; footnote omitted.)

But, however, that question is resolved, § 9(c)(1)(B) cannot possibly be read to affect the obligations of an employer, such as those here, who does not utilize that provision but flatly refuses to bargain with a union that has not petitioned for and secured a certification.

Linden Lumber also suggests (Co. Br. p. 9; cf. Bd. Br. p. 24, n. 27) that a Congressional intent to provide employers the absolute privilege the Board would grant is to be divined from the addition of § 8(c) which states:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed,

The fact that § 9(c)(1)(B) "fully supports" the Board's "present administration of the Act" against *employer* attacks based on the premise that they have "an absolute right to an election at any time," does not mean that § 9(c)(1)(B) also "fully supports" that policy against *union* attacks premised on the proposition that it is inconsistent with the Congressional intent to grant employers the limited privilege to "insist on a secret ballot election," only where, to use the language of S. Rep. No. 105, *supra*, they "have reasonable grounds for believing that labor organizations claiming to represent their employees are really not the choice of the majority." Instead the passage from *Gissel* just quoted, when read in its entirety, can only mean that § 9(c)(1)(B)

graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

It is inherently unlikely that Congress would cancel the express obligation retained in §§ 8(a)(5) & 9(a) by so oblique a means. But we need not speculate. This Court has indicated that the "narrow purpose" of § 8(c) is "to prevent the Board from attributing anti-union motive to an employer on the basis of his past statements. See H. R. Rep. No. 510, 80th Cong., 1st Sess. 45 (1947)." (*Linn* v. *Plant Guard Workers*, 383 U.S. 53, 62 n. 5.) In the words of that Conference Report the Board's "practice" § 8(c) disapproved, was the use of "speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law," not the original understanding of §§ 8(5) & 9(a). Thus § 8(c) enacts a rule of evidence not a rule of substantive law requiring the Board to create occasions for speech. (Cf. *Central Hardware Co.* v. *NLRB*, 407 U.S. 539.)[12]

"fully supports" the Board insofar as it holds that an employer presented with authorization cards alone, who commits no unfair labor practices, "can insist on a secret ballot election by filing his own petition." In conformity with the language of S. Rep. No. 105, *supra*, the Court stated that § 9(c)(1)(B) "was intended, as the legislative history indicates, to allow employers * * * to test out their doubts as to union's majority;" it did not state that the provision allows an employer having no "reasonable grounds" for doubt to demand that the union petition for certification.

[12] To round out the legislative picture a word concerning

Thus, looking both to what was accepted and what was rejected in 1947, it is plain: first, that employers sought, and Congress specifically considered granting the absolute privilege to require a union seeking recognition to petition for and secure a Board certification; and second, that Congress concluded that the proper accommodation of the competing interests at stake was to reenact §§ 8(a)(5) & 9(a) (which in express statutory terms, and as construed, impose on employer an obligation to bargain with the union "designation or selected" by the "majority," and do not grant employers that absolute privilege (see pp. 5-15 *supra*)), amended in one particular and in a manner consistent with the proposition that prompt initiation of bargaining is the Act's overriding aim—the addition of § 9(c)(1)(B) permitting employers who have "reasonable grounds" for believing that a union is "really not the choice of the majority" (S. Rep. No. 105, *supra*) to file their own petition where the union does not do so.

§ 8(b)(7)(C), added in 1959 to regulate recognitional picketing, is necessary. (Cf. Bd. Br. pp. 24-25; Co. Br. pp. 9, 21.) (It is not even contended that the remaining 1959 amendments have any bearing on these cases.) The instant proceedings do arise in a context in which recognitional picketing took place, but, at no point has the legality of that picketing been in direct issue, since no charges against the Unions were filed, and, since, as already noted (pp. 3-5), the question of whether such picketing ever perfects the duty to bargain was pretermitted by the Board's adoption of its "absolute privilege" position which renders irrelevant an inquiry into the probative value of the particular means utilized to demonstrate majority status. Since under the Board's current practice there is no form of proof other than a union secured certification that requires an employer to bargain, that practice can not be justified by § 8(b)(7)(C).

But, even assuming *arguendo*, that § 8(b)(7) is implicated here

The upshot is that there can be no doubt that the error the Board has committed here is exactly the one for which it was reversed in *NLRB* v. *Drivers Local 639 (Curtis Bros.)*, 362 U.S. 274. In *Curtis Bros.* the Board took the position that the general language of § 8(b)(1), which prohibits restraint and coercion by unions, entitled it to ban peaceful organizational picketing. As this Court pointed out, 362 U.S. at 288-290:

> "[In 1947] the House passed a bill imposing drastic limitations upon the right to picket * * * [Section] 12(a)(2) * * * would have outlawed all picketing of 'an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employers.' And [§ 12(a)(3)(c)] would have banned picketing 'an object of which [was] (i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 * * * or (iii)

it does not aid the Board. For, § 8(b)(7)(C) does not "reflect" a "Congressional objective" to "restrict" picketing of the type which took place here. (Cf. Bd. Br. p. 24) Prior to 1947 it was understood that the Act "expressly preserves the right to strike, section 13, U.S.C.A. § 163, and that includes a strike for refusing to negotiate as well as any other. It is a remedy parallel with recourse to the Labor Board." (***Remington Rand*, 94 F.2d at 871.**) In 1947, Congress refused to limit the right to engage in such picketing. (See *NLRB* v. *Drivers Local 637* (*Curtis Bros.*), 362 U.S. 274 discussed at pp. 22-24 *infra*.) Finally, since, as this Court has noted § 8(b)(7)(C) "establishes safeguards against the Board's interference with legitimate picketing activity" (*id.* at 291), the Board has held that the right "to strike and picket against an employer's unlawful refusal to recognize" is preserved. (NLRB Pet. App. p. 171 citing *Blinne Const. Co.*, 135 NLRB 1153;

> to compel an employer to violate any law * * *" HR 3020, 80th Cong., 1st Sess., 47-49. Plainly the Local's conduct in the instant case would have been prohibited if the House bill had become law.
>
> "But the House conferees abandoned the House bill in conference and accepted the Senate proposal. H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. 42. They joined in a Conference Report which stated that 'the primary strike for recognition (without a Board certification) was not prohibited.' Id., at 43.
>
> "This history makes pertinent what the Court said in Local 1976, United Brotherhood of Carpenters & Join-

see also *Dayton Typographical Union* v. *NLRB*, 326 F.2d 634, 647-648 (C.A.D.C.).)

The objection of the court below that "Refusal to cross a picket line may reflect mere fear * * * Or it may reflect a respect for what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative," (N.L.R.B. Pet App. p. 44 n. 44), fails to come to grips with the fact that in these cases each of the employees decided for himself to join a walk-out to protest the Employers' refusals to bargain, and at the time of doing so none could be sure that he would at the decisive moment receive the support of his fellows. Each chose to run the risks inherent in taking his stand openly before his employer who had demonstrated opposition to dealing with his Union, and to incur the financial loss that goes with joining a strike. That is not the act of a summer soldier. We therefore continue to believe that, on this point, Judge Parker was right when he said:

> "The contention that the company was in doubt as to the union's representing a majority of employees is little short of absurd in view of the fact that practically all of the employees went out on strike in an attempt to compel the company to bargain with the union. N.L.R.B. v. National Seal Corp., 2 Cir., 127 F.2d 776, 777." (*NLRB* v. *Harris-Woodson Co.*, 179 F.2d 720, 723 (C.A.4).)

ers v. N.L.R.B., 357 U.S. 93, 99, 100: 'It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces * * * This is relevant in that it counsels wariness in finding by construction a broad policy * * * as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law.'"

So here. As we have demonstrated (pp. 15-22), while employers may continue to believe that they should have a privilege to refuse to bargain with unions that have not petitioned for and secured a Board certification, broader than the one Congress has granted, and while they succeeded in securing approval of their view by the House, they have been "unable, to secure its embodiment in enacted law." This being so, the Board has no power to write its policy preferences into the Act to nullify, in part or in whole, the obligation to recognize unions "designated or selected" by a "majority" (§§ 8(a)(5) & 9(a)) that Congress wrote into the Act.

To paraphrase Mr. Justice Harlan's language in *Local 1424 Machinists* v. *NLRB*, 362 U.S. 411, 418 n. 7, 428:

> "The legislative history of the 1947 Taft-Hartley amendments plainly shows, that [the Congressional decision to 'follow the provisions of existing [§ 8(a)(5) law (H. Conf. Rep. No. 510, supra, at p. 41) amended only by the addition of § 9(c)(1)(B)] represented the Congressional response to the competing demands of [the right of employees to have their employer bargain promptly when presented with a demand for recognition and the right of employers to require the

> union to secure a Board certification as a condition precedent to bargaining]. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate to approach either side of that line grudgingly."
>
> "It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The 'policy of the Act' is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. * * * It may be asserted, without fear of contradiction, that the interest in [insuring proper recourse to the Board's certification procedure] is one of those given large recognition by the Act as amended. But neither can one disregard the interest in 'industrial peace [by "encouraging the practice and procedure of collective bargaining"] which it is the overall purpose of the Act to secure.' As expositor of the national interest, Congress [concluded that it would not consider the first of these interests overriding where that delays the prompt initiation of bargaining.] 'It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy * * *."

3. The foregoing understanding of the Act, as it emerged in 1947 (and as it remains today), is confirmed by this Court's decision in *Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62. That case, like these, dealt with the obliga-

tion imposed by §§ 8(a)(5) & 9(a) upon an employer who had not committed other unfair labor practices, where a:

> "union, by February 24, 1954, held applications for membership from 174 of the 225 eligible employees. Such applicants had elected officers and stewards and had authorized the union organizer to request the company to recognize the union as their collective-bargaining representative. On February 24, the organizer, accordingly, presented that request to the assistant superintendent of the plant. The latter, in the absence of any higher officer of the company, replied that the union was not recognized either by the National Labor Relations Board or by him, and that, if negotiations were desired, the union organizer should call the company's office at Pine Bluff.
>
> "On March 1, the petitioning employees struck for recognition of the union and set up a peaceful picket line of three employees. Two were placed in front of the plant and one at the side. They carried signs stating 'This Plant is on Strike' or 'We want Recognition, District 50 UNWA.'" (351 U.S. at 66-67.)

The resulting legal proceedings commenced when the employer secured a state court injunction against the picketing. (The Board's processes were not available to the union because it had not complied with the then existing filing requirements of §§ 9(f)(g) & (h).) (*Id.* at 64-66, 69-71.) But, since the doctrine that all conduct "arguably prohibited or protected" is within the NLRB's exclusive primary jurisdiction (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236) had not yet been announced, the Court decided for itself the merits of the dispute:

> "The Labor Board is but an agency through which

> Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by applicable provisions and all courts, state as well as federal, are bound by them." (351 U.S. at 74.)

In so doing the Court stated:

> "In the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated § 8(a)(5) of the Act.
>
> • • • •
>
> "Under [§§ 8(a)(5) & 9(a)] and by virtue of the conceded majority designation of the union, the employer is obligated to recognize the designated union." (*Id.* at 69, 75.)[13]

Mine Workers v. *Arkansas Oak Flooring* is cited with approval in this Court's more recent decision in *Gissel*, 395 U.S. at 597-598 (footnote omitted):

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[13] It is plain that the use of the word "conceded" meant that the facts in the record proved the majority, and not that the employer had stipulated that point:

> "Respondent also had sought the injunction on the alternative ground that the request for recognition of the union was being made in the absence of a selection of the union by the majority of respondent's employees. The Supreme Court of Louisiana did not pass upon this contention. The record upon which the temporary and the permanent injunctions were granted contained concededly genuine applications for union membership and authorizations of representation from 179 of the 225 eligible employees. Accordingly, we do not now consider the questions that would have been presented if the union or the pickets had represented less than a majority of the eligible employees, or if there had been a bona fide dispute as to the existence of authorization from a majority of the eligible employees." (*Id.* at 68 n. 2.)

"[I]n United Mine Workers, supra, we noted that a 'Board election is not the only method by which an employer may satisfy itself as to the union's majority status,' 351 U.S. at 72, n. 8., since § 9(a), 'which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen,' 351 U.S., at 71. We therefore pointed out in that case, where the union had obtained signed authorization cards from a majority of the employees, that '[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated § 8(a)(5) of the Act.' 351 U.S., at 69. We see no reason to reject this approach to bargaining obligations now, and we find unpersuasive the Fourth Circuit's view that the 1947 Taft-Hartley amendments, enacted some nine years before our decision in United Mine Workers, supra, require us to disregard that case."

Whether the foregoing was a reaffirmation of *Mine Workers* v. *Arkansas Oak Flooring* or merely an acknowledgement of its holding, after *Gissel*, as before, *Arkansas Oak Flooring* is a square and authoritative precedent contra the Board's holding in these cases. (Certainly *Gissel* demonstrates that the Court of Appeals erred in treating *Arkansas Oak Flooring* as having "merely established that a state court could not enjoin a recognitional strike." (NLRB Pet. App. p. 42).) Yet the petitioners seek to glean from the *Gissel* opinion passages and intimations that this Court there endorsed what has since, in these cases, become the Board's current "absolute privilege" position.

They would draw from the *Gissel* opinion the rule that only "an employer [who] has committed independent unfair labor practices which have made the holding of a fair election unlikely" (cf. 395 U.S. at 610), is required to recognize a union that has not secured a Board certification. (Bd. Br. pp. 18-22; Co. Br. pp. 12-13.) The source of that asserted rule is the Court's holding:

"that the Board is not limited to a cease-and-desist order * * * where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside * * * but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. (*Id.* at 610.)

It is a logical absurdity to read a holding that an employer has a duty to bargain without an election under *some* circumstances (*viz*, when he commits serious unfair labor practices which make a fair election unlikely) into a holding that that is the *only* circumstance under which he has a duty to bargain without an election. That such illogic should be attributed to this Court is particularly ironic since the late Chief Justice took pains to specify what was and what was not being decided. In the opening sentence of his opinion for a unanimous Court he stated, "These cases involve the extent of an employer's duty under the National Labor Relations Act to recognize a union that bases its claim to representative status *solely on the possession of union authorization cards,* * * *." (395 U.S. at 579, emphasis added.) Thus, in terms of the analytical framework set out at pp. 3-5 of the introduction to our argument, *Gissel* did not focus on, or change the law (as exemplified in

Arkansas Oak Flooring) with respect to the first of the issues which we have defined. Rather, the Court provided a partial answer to the second question, namely that the Board does have power to require an employer to bargain without an election, if he has committed unfair labor practices which made a fair election unlikely.

In so doing the Court put "aside [for that case] the Union's arguments * * * [that the] right to rely on cards * * * should be * * * correspondingly more expanded than the Board would have us rule * * *," in order to consider "the points of difference between the employers and the Board," *viz*, whether cards can support a bargaining order where the employer does violate §§8(a)(1)-(4). (*Id.* at 594-595.) This made it unnecessary for the Court to pass on the merits of the Board's then current practice, insofar as that practice could be said to expand the privilege of employers to refuse to bargain. Nevertheless, petitioners rely on *Gissel* as support for the Board's present "absolute privilege" position which creates an even broader employer privilege than that which the Agency had advanced on oral argument in *Gissel*. There the Board had represented that:

> "When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, *unless he has knowledge independently of the cards that the union has a majority*, decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself under §9(c)(1)(B)." (*Id.* at 591; emphasis added.)

In other words, at that time, the Board did not claim that employers who do not commit other unfair labor practices have an absolute privilege to refuse to bargain with a union that has not secured a Board certification, but only that such an employer has a privilege to deny "recognition immediately" in response to a union "demand based on possession of cards allegedly signed by a majority." As the court below recognized: "This is not just a matter of historical detail. Inherent in the [Board's change of] position is a difference which goes to the heart of the Congressional policy established by the statute." In contrast to its practice as described in *Gissel*, pursuant to which the Board would rely "on conduct by the employers or employees in drawing the inference that the employer must have known that the union had a majority," the Board's present view "means that even if an employer acts in total disregard of 'convincing evidence of majority status' he has no duty to recognize a union." (NLRB Pet. App. pp. 41-42.) Since the Court in *Gissel* did not even endorse the narrower position which the Board advanced at the *Gissel* argument, the petitioners are entirely unjustified in relying in these cases on what *Gissel* did decide.

The petitioners also seize upon the following portion of this Court's opinion in *Gissel*: "We emphasize that *under the Board's remedial power* there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." (395 U.S. at 615, emphasis added.) From this, the Board's brief argues that "If a bargaining order based on cards is not warranted even in some cases where the employer has committed inde-

pendent unfair labor practices, it would be anomalous to hold that one is nonetheless required where the employer has committed no unfair labor practices." (Bd. Br. p. 26; see also Co. Br. pp. 12-13.) But this argument, too, is based on a misunderstanding of *Gissel*. For, the language quoted was written in the context of the Court's determination of the question whether a bargaining order is an appropriate exercise of remedial power under § 10(c) where there have been violations of §§ 8(a)(1)-(4);[14] it did not reach, much less exhaust, the question of when or whether an employer has a substantive obligation to bargain with a union that has not secured a Board certification. That these are analytically distinct questions, and were treated as such in *Gissel*, is beyond controversy. For, the Board itself in an elaborate recent opinion (*Steel Fab. Inc.*, 212 NLRB No. 25, 86 LRRM 1474, 1475-1478) has made precisely the same point:

> "In effect, by issuing a [Gissel] bargaining order, we are remedying an employer's 8(a)(1) violations that have dissipated a union's majority and prevented the holding of a fair election. • • • In Gissel, the Court's decision approved the propriety of a bargaining order as a remedy for substantial non-8(a)(5) violations. The Court, recognizing the Board's authority to issue a bargaining order without finding a violation of Section 8(a)(5), stated, 'The Board . . .

[14] The Court stated the question it answered at 395 U.S. at 615, as follows:

> "[W]hether a bargaining order is an appropriate and authorized remedy where an employer rejects a card majority while at the same time committing unfair labor practices that tend to undermine the union's majority and make a fair election an unlikely possibility." (*Id.* U.S. at 579.)

> has long had a . . . policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.' N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575, 614 (1969).
>
> • • • •
>
> "The central issue in these cases is, as the Court's opinion in Gissel spells out, the propriety of the Board's use of a bargaining order as a remedy for varying degrees of employer unfair labor practices. We see no point in cluttering up the analysis of this central issue with the kinds of matters which we customarily consider in deciding whether an employer has or has not met the kinds of bargaining obligations dealt with in our typical refusal-to-bargain 8(a)(5) cases. Indeed it is our view, in hindsight, that if the Board, ab initio, had treated this as a purely remedial issue and had not interjected the superfluous 8(a)(5) finding, much confusion could have been avoided.
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> • • • •
>
> "As stated by Chairman Miller in United Packing, [187 NLRB 878, 880] it distorts our analysis to predicate bargaining orders on 8(a)(5) violations, and it is desirable for the Board to concentrate solely on a careful examination of the employers 8(a)(1) conduct and its impact upon the holding of a fair election. Henceforth, in these Gissel-type situations, we shall dispense with finding an 8(a)(5) violation and instead determine only whether or not a bargaining order is necessary to remedy the employer's 8(a)(1)'s."

The foregoing represents the views of the majority of the Board in *Steel Fab*—the same majority which decided the instant cases. The dissenter in *Steel Fab* objected that a decision to issue a bargaining order because of violations

of §§ 8(a)(1)-(4) does not remove the Board's obligation to consider whether the employer has also violated § 8(a)(5) and whether a bargaining order is required for that additional reason. (86 LRRM at 1478-1483.) The respective positions of the majority and the minority in *Steel Fab* are in harmony with their respective views in the present cases. For, the majority view in *Steel Fab*, like that in these cases, virtually eliminates § 8(a)(5) as an independent course of a duty to bargain with uncertified unions—a view which the minority does not accept. The significance of *Steel Fab* for present purposes is that the majority was there brought to recognize—contrary to intimations in its opinions in the present cases and the arguments of its counsel—that nothing in *Gissel* authorizes the *pro tanto* nullification of § 8(a)(5).

The petitioners also place great weight on the following passage, which introduces the *Gissel* Court's response to the "objections to the use of cards voiced by the employers and the Fourth Circuit:"

> "The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support. The acknowledged superiority of the election process, however, does not mean that cards are thereby rendered totally invalid, * * *" (395 U.S. at 602; see Bd. Br. p. 28; Co. Br. p. 8.)

The proposition that the Board's "election process" is "superior" to "cards" can not be transmuted into the Board's present position which mandates a union seeking recognition to petition for certification if an employer who

has not committed other unfair labor practices requires that course by refusing to accept *all* other methods of proving that the majority of the employees have in fact "designated or selected" that union as their representative.

The evaluation stated in *Gissel* is predicated on a comparison between two specific alternatives—authorization cards standing alone as contrasted with a Board election. One cannot validly generalize from the proposition that alternative A is superior to alternative B to the conclusion that A is superior to all other alternatives, especially where alternative B was assumed to be the least satisfactory among several alternatives. (See *Gissel*, 395 U.S. at 604-605.)

The Board itself has understood that its election procedure is not qualitatively superior to all the available possibilities. For example, the Board has ruled that it is lawful for an employer to determine the validity of a union's claim that it has been "designated or selected" by a majority, by polling those employees, so long as:

> "(1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere." (*Struksnes Const. Co.*, 165 NLRB 1062, 1063 cited with approval in *Gissel*, 395 U.S. at 609.)

And the Board continues to hold, as it has in the past, that where an employer "unilaterally undertakes to determine the Union's majority or minority status by means of poll,

under conditions of his own choosing," rather than requiring the union to petition for a certification, the employer "cannot thereafter disclaim the results simply because it finds them distasteful" without violating §8(a)(5), since "there can be no doubt concerning the employees' preference thus expressed." (*Sullivan Electric Co.*, 199 NLRB No. 97, 81 LRRM 1313, 1314-1315, enforced 479 F.2d 1270 (C.A. 6).)

Thus, the Board's present " 'voluntarist' view of the duty to bargain" (which permits an employer to refuse a request to bargain by a union which possesses authorization cards and proposes a *Struksnes* poll as a method for authenticating the cards in order to satisfy any employer doubt as to their accuracy) does not rest on reasoned objections to alternative means which have proved reliable over the years. Rather, that position rests on the view that the employer has an absolute privilege, the course of which is unspecified, to refuse to recognize a union that has not petitioned for and secured a Board certification which he can waive. But Congress has created no such *employer* privilege. (See pp. 5-25 *supra*.)

Congress has chosen not to grant employers that privilege because the benefits of prompt effectuation of the employees' §7 right "to bargain collectively through representatives of their own choosing," which is "the primary means fashioned by Congress for securing industrial peace" (*IUE* v. *NLRB*, 426 F.2d at 1249), outweigh the benefits which would be gained by freeing employers of the obligations imposed by §§8(a)(5) & 9(a), thereby requiring unions in every case to file their own certification petitions, a course

which entails "considerable delays" (*Gissel*, 395 U.S. at 595).

Where, to return to the example suggested by *Sullivan Elec. Co., supra*, a union presents authorization cards backed by an offer of a cross-check through an employer poll of the employees, the case for the superiority of a Board election, as a mirror of the employees' sentiments at the time of the demand, is attentuated in the extreme. It cannot be said that an election many weeks or months after the demand will provide a sounder indication of employee's "true" desires than the authorization cards, supported by a poll at the very time in question. (See pp. 35-36 *supra*.) As Professor Lesnick has noted, those who contend that a Board election is qualitatively superior to prompt informal means of proving a majority are guilty of:

> "* * * inappropriate romanticizing about employee free choice and its relevance to what actually goes on when employees are asked to vote for or against unionization * * * [E]mployees do not make choices about unionization for the same reasons, or in the same context, that they join veterans' organizations, political parties, churches, or bowling leagues * * * The fact is that we have a dual regime in our labor law: We attempt to insulate employees from economic pressure affecting **their decision whether or not to bargain collectively,** but we build our scheme of collective bargaining on the foundation of economic power. The governing principle, to adapt Professor Cox's happy aphorism to this context, is: 'To the lion belongs the lion's share.' We delude ourselves, however, when we begin to think of these compartments as watertight, and the election campaign is the spot at which the point of leakage is

to be found. The lawful coercion of collective bargaining must affect the intended free choice of the voters in a Labor Board election * * * But a 'free' choice connotes one protected from coercive pressures, not merely one fully informed of them, and it makes a mockery of the notion of free choice to invoke it as the interest which clamors for expression via an employer anti-union campaign [prior to an election]." (Lesnick, *Establishment of Bargaining Rights Without an Election,* 65 Mich. L. Rev. 851, 865, 866-867; see also *Gissel,* 395 U.S. at 603-604.)[15]

Requiring unions in every case to secure a Board certification can not therefore be defended on the ground that it is the only method assuring accurate measurement of employee desire for collective bargaining. And, there can be no doubt that the absolute privilege the Board has granted employers undermines the proper administration of the Act. We have already noted (pp. 8-9 n. 8 and pp. 12-13) the Board's recognition in *Ex-Cell-O,* 185 NLRB at 108, that an employer who exhausts the full panoply of procedures provided in a representation case secures a "delay of 2 or more years in the fulfillment of a statutory bargaining obligation," and the basic truth that "Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining," (*IUE* v. *NLRB,* 426 F.2d at 1249). At this juncture we would only add the insight the court below stated in the *IUE* case that is fully applicable here:

[15] To the points made by the Court in *Gissel* we would add that because of the continuing nature of their relationship the employer also has the opportunity to get his message to the employees prior to the time the union ever appears on the scene.

"Not only furtherance of national labor policy but also important considerations of judicial administration are involved. Simply put, the present posture of the Board encourages frivolous litigation not only before the Board, but in the reviewing courts. The case at hand is in point. The position of the Company is palpably without merit with respect to its refusal to bargain. Yet it profited through the delay that review entails: all during this litigation it has not had to bargain collectively over wages or other financial aspects of employment.

"The courts, then, are doubly concerned when Board inadequacies drain and divert judicial resources from the provision of justice to the crowded calendars and to meritorious litigants whose claims clamor for attention. The same considerations are presumably applicable at the administrative level." (426 F.2d at 1249-1250.)

The Board's brief (Bd. Br. pp. 23-24) protests that the interest in avoiding delay cuts in its favor. It argues that pursuant to its present position:

"an election can be held expeditiously. The Board's present position encourages the resolution of representation questions by this salutary means. * * * Unfair labor practice proceedings, particularly where the validity of each card is contested, are generally far more protracted than representation proceedings."

But the figures the Board cites were apparently selected so as to mislead in that they compare the time necessary for a "regional director [to] direct an election" which is not the culmination of a representation case (since there remains the election itself, a right to file objections with the regional director and a right to petition for Board

review) with the time necessary to process an unfair labor practice case to final "Board decision". And, the Board commits even more fundamental errors. The fancy that an employer who refuses to accept any alternative for ascertaining a union's majority status other than a union petition for a certification will, upon the filing of that petition, endeavor to expedite a Board election, and promptly accept the result, is extraordinarily naive. Such an employer's demand for that one method of proof can not be said to demonstrate a desire to allay "reasonable grounds" for believing that the union is "really not the choice of the majority" (cf. S. Rep. No. 105, *supra*); it can only be viewed as an effort to secure delay for its own considerable value. The representation process is not, as the Board seeks to imply, an alternative to litigation through an unfair labor practice case; it is merely a first stage of litigation antecedent to an unfair labor practice case. After an election the employer is free of sanctions until a subsequent § 8(a)(5) proceeding has run its course. (*Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146; *Magnesium Castings Co.* v. *NLRB*, 401 U.S. 137.) As Member Fanning stated, dissenting from the second supplemental decision in *Wilder:*

> "[T]he holding in *Linden Lumber* and in [*Wilder*] permits employers who are unwilling to engage in collective bargaining * * * to take advantage of the [election] procedures for purposes of delay * * * Should that election result in a union victory, they may still refuse to bargain to test the certification in an unfair labor practice proceeding. In either event, the bargaining obligation will be imposed on them after long months, even years, of delay when the union's strength has been dissipated by attrition and

> discouragement. Admittedly, not all employers seek to utilize the election procedures for purposes of obstruction and delay. * * * But our rules must be tailored to the "unwilling employers" as well as to the cooperative employer and the rule applied in this case permits employers, such as the respondent in *Linden Lumber* * * * to declare their intention to disregard any certification that might come out of an election, and still escape a bargaining order because the union did not file a petition. Such a rule encourages recalcitrance on the part of employers without any corresponding furtherance of any other policy embedded in our labor laws." (N.L.R.B. Pet. App. pp. 192-193.)

The Board's brief not only misstates the nature of the relationship between its representation procedures and unfair labor practice proceedings, it ignores the point that the Board's present position removes all incentive for employer acceptance either of private methods for the resolution of representation questions (including those utilizing procedures the Agency itself recognizes are reliable such as a cross-check of cards through an employer poll), or, of Board consent election agreements, which are certainly reliable. Yet, these are preferable to union initiated representation cases since the latter is the most protracted method for resolving representation questions. (See pp. 8-9 n. 8 *supra*.) Employers, of course, normally consider the "avoidance of bargaining * * * an economic benefit." (*IUE* v. *NLRB*, 426 F.2d at 1249.) The only rational expectation is, therefore, that since it maximizes delay employers will take full advantage of the Board's current practice which frees them from the obligation to recognize a union that has not secured a Board certification. One

can not expect employers to assume an obligation that "encourage[s] the practice and procedure of collective bargaining" unless it is imposed by law. That is why the Wagner Act was necessary in the first place. But our legal system does rest on the proposition that a substantial portion of those regulated by a statute will respect the duties imposed upon them without the necessity of coercive sanctions. This case is not about the comparative merits of contested representation cases as against contested unfair labor practices cases. The major consequence of the outcome will be whether the law will encourage protracted litigation or whether it will encourage utilization of less expensive and time consuming procedures for initiating collective bargaining. In terms of pure policy, the only terms which the Board has addressed, the ultimate indictment of the Board's current "absolute privilege" position is that it rewards employer recalcitrance.[16]

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[16] Compare NLRB Press Release dated July 1, 1974:

"NLRB ISSUES RECORD NUMBER OF DECISIONS

"The National Labor Relations Board broke all records during fiscal 1974 in deciding cases under the nation's primary labor relations law.

• • • •

"The five-Member Board handed down 977 decisions in contested unfair labor practice cases brought before it by individuals, employers, and unions. Additionally there were 543 rulings by the Board in employee representation election cases. Each total was a record, and the combined figure was 100 decisions more than the previous mark of 1,420 decisions in unfair labor practice and representation cases set last year.

• • • •

" 'We continue to be faced with a growing caseload,' said Chairman Miller. 'We have somehow managed to keep pace with it. This five-man Board, aided by staffs which have had almost no increases in personnel since I became Chairman four years ago, has coped with an approximate 25% rise in cases over that period. I am, frankly, surprised that we have been able to cope this well, and I have genuine doubts we can do it much longer without Congressional action to modernize our almost 40-year-old, antiquated, decision-making structure.' "

The false argument built upon *Gissel* that pervades the Board's brief, and to which we reply last, is the contention that the position the Board adopted in these cases is necessary to avoid "the tangled thicket of subjective motivations" (Bd. Br. p. 21). Reliance is placed on *Gissel* approval of the Board's abandonment of a subjective good faith test for determining whether employer unfair labor practices justify a bargaining order. (Bd. Br. pp. 19-20.) We need not reiterate our objection that what this Court said in one context is not necessarily applicable in another context. Nor will we dwell on the point that *Gissel* did not permit the Board to dilute the employer obligation there stated as it had been previously understood, but rather, simply permitted the Board to strip away a veneer of subjective motivation in order to reveal the objective criteria which had actually controlled the decision making process all along. That reform, of course, was warranted in light of the criticisms that had been leveled at the Board's failure to provide a satisfying rationale for issuing bargaining orders on the strength of subsequent other unfair labor practices. (Cf. Bd. Br. pp. 17-18 n. 16.) But those criticisms were not leveled at the precedents upon which we rely. For the obligation they state is derived directly from §§ 8(a)(5) & 9(a) and not, as in a *Gissel*-type case from § 10(c). And

here, the Board's method of abandoning its good faith test does not clarify the prior law, it replaces an obligation explicitly stated in the Act with an absolute privilege nowhere to be found in the statute.

For, it is a sufficient answer that we are not suggesting that any subjective test be applied by the Board. Indeed, as we have pointed out (pp. 5-15), the pre-1947 precedents, which Congress preserved in 1947, rested on largely objective criteria. It is our position that the Board not only has the power but the duty to establish objective criteria for determining when an employer who has not committed unfair labor practices must bargain with the union. What its criteria shall be is the second issue which we identified at the outset of this brief and which we have insisted throughout is not here. It is precisely because we believe that it is the Board's duty in the first instance to develop these criteria that we did not cross petition in this Court for review of so much of the Court of Appeals judgment as denied a bargaining order at this time. As Mr. Justice Frankfurter stated in *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 where the Board challenged a Court of Appeals decision on the ground that to "apply the abstractly just doctrine" decreed "would put on the Board details too burdensome for effective administration" (*id* at 198):

> "Simplicity of administration is thus the justification for [the Board's position] • • • But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its adminnistrative resourcefulness." (*Id.*)

A fortiori the Board can not escape its duty by adopting a rigid rule of law which Congress distinctly rejected in 1947. Indeed, even if the Board were to deny the ability to formulate objective criteria this Court would not accept its disclaimer. (Compare *NLRB* v. *Radio and Television Broadcast Engineers*, 364 U.S. 573, 582-583.)

• • • •

One final word is necessary. Addressing itself to what the Court of Appeals said on the issue not presented here of the privileges and obligations of an employer who files his own §9(c)(1)(B) petition (see pp. 16-19 *supra*), the Board's brief responds:

> "[I]f Congress had intended to impose the requirement that the employer must file a petition for an election in order to avoid violation of Section 8(a)(5), it seems reasonable to suppose that it would have said so. Neither the language of the Act nor its history reflects any such intention." (Bd. Br. p. 30.)

Whether or not the Court of Appeals was correct (and we believe it was wrong) in drawing from Congress' decision to enable employers to file such petitions, a privilege to refuse to recognize a union that has presented "convincing evidence of majority support" (see pp. 5-15), on the issue that is before the Court the shoe is on the other foot. "Congress" *has* "said," explicitly that "it is an unfair labor practice for an employer to refuse to bargain collectively with the representative • • • designated or selected • • • by the majority of the employees in a[n] • • • appropriate • • • unit," (§§8(a)(5) & 9(a)). And, it retained that

statutory language after it had been established that, as those words plainly signify, §§ 8(a)(5) & 9(a) do impose on employers (whether or not they have committed other unfair labor practices) an obligation to bargain with a union that has not petitioned for and secured a Board's certification, and do not, as the Board held here, grant an absolute privilege to refuse to do so. "[I]f Congress had intended to [grant that privilege] it seems reasonable to suppose that it would have said so."

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

Nos. 73-1234 and 73-1231

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRUCK DRIVERS UNION LOCAL NO. 413, AND TEXTILE WORKERS UNION,
Respondent.

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

AND

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE*.

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* Pursuant to its Motion, granted by the Court, the Chamber filed a brief *amicus curiae* in support of the petitions for Writ of Certiorari herein.

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief *amicus curiae* on behalf of the petitioners in these cases.

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in this Court in matters involving important questions concerning the administration and interpretation of the National Labor Relations Act. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests as an aide to this Court's deliberations in a number of such cases.**

The question presented in the instant cases—whether an employer, who has not interefered with the National Labor Relations Board's representation election process, may be required to bargain with a union asserting that it is the representative of a majority of the employer's employees where the union's majority status has not been established through the Board's election processes—is a matter of significant concern not only to the Chamber's membership but also for the administration of the National Labor Relations Act generally. The Board and the court below have reached far different conclusions with respect to the obligation of an employer who is confronted with

** *E.g., N. L. R. B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, No. 72-1598 (1974); *N. L. R. B.* v. *The Boeing Company, et al.*, 412 U. S. 84 (1973); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *N. L. R. B.* v. *Burns Int'l Security Services, Inc.*, 406 U. S. 272 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970).

a union demand for recognition. Therefore, the decision of this Court is one which will significantly determine the future direction of the representation process, and will touch and concern every employer subject to the jurisdiction of the Act. The Chamber is thus vitally concerned that this issue be properly resolved by this Court. Because of its broad representation of employers, the Chamber is in a position to present arguments to this Court concerning the instant issue which might not otherwise be advanced by the parties.

Wherefore, for the foregoing reasons, the Chamber of Commerce of the United States respectfully requests that this Motion for Leave to File Brief *Amicus Curiae* be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

Nos. 73-1234 and 73-1231.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRUCK DRIVERS UNION LOCAL NO. 413, AND TEXTILE WORKERS UNION,
Respondent.

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
AND
TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

INTEREST OF THE AMICUS.

The interest of the Chamber is set forth in the foregoing "Motion for Leave to File Brief *Amicus Curiae*."

SUMMARY OF ARGUMENT.

I.

In *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U. S. 575 (1969), this Court held that the touchstone in determining whether the representation election process mandated in the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151, *et seq.*, should be bypassed, and an employer should be ordered to recognize and bargain with a union seeking recognition, was whether the employer committed unfair labor practices which rendered the holding of a fair election improbable. The Court affirmed the Board's view that an employer's subjective motivation, his "good faith doubt", in rejecting the Union's claim was irrelevant and would not support the issuance of a bargaining order. Consistent with this Court's rationale in *Gissel*, the Board, in the instant cases, concluded that inquiry into an employer's subjective state of knowledge was a return to the good faith doubt "thicket", and that where the employer committed no unfair labor practices which would tend to undermine the election process, a bargaining order would not lie.

The Court of Appeals, on the other hand, posits a rule which would require the employer to file an election petition to demonstrate his "good faith doubt" whenever a union presents asserted evidence of majority status if he is to avoid inquiry into the actuality of his subjective motivation in refusing to recognize the union and requesting that the union seek an election. The Court of Appeals, thus, resurrects the good faith doubt test contrary to the rationale of *Gissel*.

II.

The lower court's view that the Act compels an employer to recognize a union or initiate the election process whenever the union asserts a claim of majority status is not supported by and is contrary to Congressional design; is destructive of basic policies which permit the employer to present his views against unionism and which seek to engender informed and reasoned employee selection through the election machinery; encourages unions to bypass the Congressionally preferred election procedure and engage in recognitional strikes and picketing contrary to the literal wording and policy of the Act; and, by placing the affirmative burden on employers to institute the election process, erroneously restructures that process, relieving the union of burdens heretofore deemed essential and transforming that process into a vehicle for tactical maneuverability in the hand of unions.

III.

The error of the lower court's view results from its failure to comply with the command of *Gissel* that the pertinent inquiry in determining the propriety of a bargaining order is whether a fair election may be held, and from the court's adherence to the remaining vestige of "good faith doubt" embodied, for example, in the doctrine of *Snow & Sons*, 134 NLRB 709 (1961), *enf'd.* 308 F. 2d 687 (CA 9, 1962). The disagreement between the Board and court below thus fails to come fully to grips with the *Gissel* analysis in two respects: (1) In "Category I, II and III" cases, by failing to engage in the causal analysis necessary to determine whether, when an employer has engaged in unfair labor practices, they are of the type which would render a fair election improbable; and (2) in "Category IV" cases, where the employer has committed no unfair labor practices or the unfair labor practices are so removed from the election process as to be *de minimus*, that what the employer might know, see or expect has no bearing on whether a fair

election may be held and, therefore should not give rise to a bargaining order. Examination of the *Snow & Sons* doctrine and of the Board's failure to engage in the causal analysis ordered by *Gissel* in post-*Gissel* cases, suggests that the Board has not fully conformed with this Court's directive, and further direction by this Court is needed to instruct, consistent with its *Gissel* rationale, that a bargaining order is appropriate *only* when pervasive unfair labor practices have rendered the use of traditional remedies ineffective.

ARGUMENT.

For years, the National Labor Relations Board and the courts struggled with the problem of determining under what circumstances the Board's representation election procedures may properly be bypassed and an employer ordered to bargain with a union claiming to represent his employees. Finally, in *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969), the Board recognized, with this Court's approval, that the propriety of ordering an employer to bargain with a union demanding recognition is governed by whether the employer has engaged in serious unfair labor practices which render the likelihood of free expression through the election process improbable.

In the instant cases, the Board adhered to the rationale of *Gissel*, and with this adherence the *Amicus* agrees. The Court of Appeals herein, however, departed from the reasoning of *Gissel*, and its decision should be reversed.

I.

THE DECISION BELOW IS CONTRARY TO THE RATIONALE OF THIS COURT'S DECISION IN GISSEL.

The thrust of this Court's decision in *Gissel* is to disaffirm the relevancy of any inquiry into an employer's subjective motivation in determining the propriety of a bargaining order when that employer is confronted with a union's demand for recognition and asserted evidence of majority status. Rather, in *Gissel*, this Court viewed the employer's overt conduct in response to unionization and the impact of that conduct on the representation process as the factors determinative of whether bargaining order recognition should take precedence over the Board's election process in the effectuation of the purposes and

policies of the Act. Thus, the *Gissel* Court articulated two categories of employer unfair labor practices which, because of their impact upon the election process, (1) render a fair election impossible[1] and (2) those unfair labor practices which though less pervasive than those in category one, "still have the tendency to undermine majority strength and impede the election process."[2] That the employer's subjective motivation is irrelevant and that it is the impact of his conduct on the election process that is the key, is borne out by a third category of "minor or less extensive unfair labor practices, which because of their minimal impact on the election machinery, will not sustain a bargaining order."[3]

There is a fourth category of employer "response" along this continuum that the *Gissel* Court expressly declined to evaluate[4] and that is placed in issue by the instant cases: Whether an employer who refrains from committing unfair labor practices that would tend to destroy "laboratory conditions" of the election process is properly subject to a bargaining order by insisting that the union seek an election. The logical thrust of *Gissel* compels the conclusion that a bargaining order is not appropriate where, as here, the employers have engaged in no conduct destructive of a fair election, and since, as the *Gissel* Court acknowledged, an election is the "preferred means"[5] to the resolution of recognitional claims. It simply does not follow that while an employer who, in response to a union demand

1. Those unfair labor practices of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies with the result that a fair and reliable election cannot be had." 395 U. S. at 614. The Court explained that in such "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices, a bargaining order would be appropriate to remedy such practices even in the absence of a Section 8(a)(5) refusal to bargain violation or even a bargaining demand by the union.

2. *Id.*

3. *Id.* at 615

4. *Id.* at 595, and 601, n. 18.

5. *Id.* at 602.

and asserted evidence of majority status, commits unfair labor practices of the third category will not be ordered to bargain, another employer, faced with the same demand and asserted evidence of majority support, but without committing any unlawful conduct, will be ordered to bargain solely because the union in the latter instance chooses not to test the strength of its claim in the sanctity of the voting booth.[6]

The problem herein results from a *caveat* to the Board's announced policy[7] of rejecting inquiry into an employer's subjective state of mind: "[A]n employer [who committed no unfair labor practices destructive of the election process] could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union."[8]

This so-called "independent knowledge" exception to the principle announced in *Gissel* is the sole remaining vestige of subjective motivation inquiry. It has its origin in the case of *Snow & Sons*,[9] where the employer agreed to a check of the

6. By its decision in *Bernel Foam Prods. Co.*, 146 NLRB 1277 (1964), the Board sought to encourage union resort to the election process by permitting unions to seek elections without foregoing the right to later obtain a bargaining order should the employer's pre-election conduct unlawfully dissipate the union's claimed majority status, resulting in a union loss at the polls. Prior to *Bernel Foam*, a union claiming majority support had to elect whether to demand recognition and seek confirmation through refusal to bargain charges or whether to seek an election. A choice of one option waived the other. As a result of *Bernel Foam*, however, unions were not forced into a Hobson's choice, with the result that the desired "laboratory conditions" which foster informed and free choice would have the opportunity to prevail.

7. "Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment' to the union." *Gissel, supra*, at 594

8. *Id.* at 594 (Emphasis the Court's).

9. 134 NLRB 709 (1961), *enf'd.* 308 F. 2d 687 (CA 9, 1962).

union's authorization cards and, after satisfying himself from the evidence of those cards that the union represented a majority, continued to refuse to recognize the union. The Board has, therefore, taken the position that the independent knowledge test is limited to the situation where an employer reneges on an agreement to have the union's majority established by a means other than a Board election.[10] In the Board's view, any further expansion of the independent knowledge test would be a return to the "good faith doubt thicket" laid to rest in *Gissel*. As the Board explained in the *Linden* case herein, in apparent obedience to the logic and rationale of this Court's *Gissel* decision:

> "The facts of the present case have caused us to reassess the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge and (b) intent at the time he refuses to accede to a union demand for recognition. Unless, as in *Snow & Sons*, the employer has agreed to let its 'knowledge' of majority status be established through a means other than a Board election, how are we to evaluate whether it 'knows' or whether it 'doubts' majority status? And if we are to let our decisions turn on an employer's 'willingness' to have majority status determined by an election, how are we to judge 'willingness' if the record is silent, as in *Wilder*, or doubtful, as here, as to just how 'willing' the Respondent is in fact?"[11]

Accordingly, the Board concluded that an employer's subjective state of knowledge is as irrelevant as subjective good faith doubt in determining the propriety of a bargaining order. The Board's reasoning and its refusal to apply the "independent knowledge" test in *these cases* is therefore consistent with *Gissel* because, as in *Gissel*, the Board focuses on the employer's conduct and the causal effects of his conduct. In the situation confronted in *Gissel* the employer's unfair labor practices have the effect of rendering the election process a nullity. Where,

10. See, the Board's Petition for Writ of Certiorari herein, at p. 15, n. 18.

11. 190 NLRB at 720-721.

however, an employer is faced with asserted evidence of majority support and by his conduct does not seek to destroy the "laboratory conditions", there is no reason for the union's failure to utilize established election procedures.[12]

The lower court, however, justified its rejection of the Board's conclusion herein in a manner contrary to the thrust of *Gissel* and the Board's adherence to the *Gissel* rationale in these cases, by focusing not on the employer's conduct and the implications of that conduct on whether an election would be a useless exercise, but, rather, by resurrecting the ghost of "good faith doubt". Moreover, it did so in such a way as to place the burden of proving his good faith on the employer, a burden which was shifted away from the employer even before the demise of the inquiry into "good faith doubt."[13]

Thus, while the court below recognized the inherent unreliability of asserted evidence of majority support, such as au-

12. While the *Amicus* agrees with the Board's adherence to the *Gissel* rationale in the instant cases, and for this reason and others set forth in our brief herein, urges this Court to reject the views of the Court of Appeals, the Chamber believes that the *Snow & Sons* independent knowledge doctrine, as a basis for bypassing the election procedure, is no longer viable in light of *Gissel*. As set forth more fully hereinafter in Part III of our brief, this lingering retention of the good faith doubt element is inconsistent with the rationale of *Gissel* and has nothing to do with causal effect of unfair labor practices on the election process, the basis for issuing a bargaining order in recognition cases. Examination of the *Snow & Sons* doctrine and the Board's failure to really apply the *Gissel* criteria to the issuance of remedial bargaining orders in post-*Gissel* cases, indicates that, contrary to the Board's asserted policy, good faith doubt is not really a dead letter. Therefore, guidance to the Board with respect to the application of the *Gissel* criteria to the issuance of bargaining orders is needed. Thus, since *Gissel* settled this area of law except for the remaining issue hereunder consideration, the instant case presents an appropriate opportunity for this Court to instruct the Board, consistent with its *Gissel* rationale, that a bargaining order is appropriate *only* when pervasive unfair labor practices have rendered the use of traditional remedies ineffectual.

13. *Aaron Bros. Co.*, 158 NLRB 1077 (1966); *Jem Mfg., Inc.*, 156 NLRB 643 (1966); *John P. Serpa, Inc.*, 155 NLRB 99 (1965), order set aside, *Retail Clarks Local 1179* v. *N. L. R. B.*, 376 F. 2d 186 (CA 9, 1967).

thorization cards or strikes,[14] it nevertheless determined that such concededly unreliable manifestations require the employer to come forward and file his own petition for an election to demonstrate his good-faith doubt if he is to avoid a bargaining order and an inquiry into his subjective state of mind.[15] The lower court, therefore, has returned to the good faith quagmire, contrary to the thrust of *Gissel*. Moreover, it has done so by an erroneous interpretation of the statutory provisions upon which it relies, and in so doing has suggested a rule which is contrary to the policies of the Act as a whole and which drastically restructures the entire representation process.

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14. "Refusal to cross a picket line may reflect mere fear, See *N. L. R. B.* v. *Union Carbide Corp.*, 440 F. 2d 54, 56 (4th Cir., 1971) *cert. denied*, 404 U. S. 826 (1971), or it reflects what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative." *Truck Drivers Local 413* v. *N. L. R. B.*, ...F. 2d ..... 84 LRRM 2177, 2185, n. 44 (CA DC, 1973), [hereinafter cited as *Linden*].

In the *Union Carbide* case, cited by the lower court herein, the Fourth Circuit acknowledged the fact, as testified to by an employee in the Board proceeding, that the employee refused to cross the union's picket line for fear of bodily harm. Moreover, the reasons why employees may refuse to cross picket lines are as varied as their individual personalities. Some may choose not to cross, for example, out of principle wholly unrelated to the goals of the union, out of fear, because of group pressure, or, perhaps, because of social ostracism by fellow employees. Certainly, the alleged "strength" of any inference of majority support to be drawn from a picket line is much less than even that to be drawn from authorization cards.

15. The lower court viewed authorization cards and picketing as creating:

> "[A] sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid any duty to bargain and any inquiry into the actuality of his doubt." *Id.*, at 2186.

II.

THE LOWER COURT'S DECISION IS CONTRARY TO THE BASIC POLICIES OF THE ACT AND ERRONEOUSLY AND IMPERMISSABLY RESTRUCTURES THE REPRESENTATION PROCESS.

The lower court's decision rests upon its interpretation of Section 9(c)(1)(B) of the Act, which provides for employer representation petitions,[16] as compelling, under penalty of Section 8(a)(5), an affirmative obligation on the part of an employer to institute the representation process. As set forth below, such an interpretation of that Section 9(c)(1)(B): (a) constitutes an erroneous construction Congressional intent; (b) renders nugatory the employer's Section 8(c) right to present his employees with his views; (c) encourages industrial disruption occasioned by recognitional strikes contrary to the

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16. Section 9(c), in relevant part, provides:

> "(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in Section 9(a);
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

policy of Section 8(b)(7)(C); and (d) impermissibly restructures the nature of the representation process.

A. The Lower Court's Interpretation of Section 9(c)(1)(B) Constitutes An Erroneous Construction of Congressional Design.

The legislative history of Section 9(c)(1)(B) reveals that it was enacted precisely to eliminate an unfairness to employers that existed under the Wagner Act, prior to the 1947 Taft-Hartley amendments, which the court below would now reimpose. Under the Wagner Act, employers were permitted to file election petitions only when confronted with multiple claims for recognition by different unions. The Taft-Hartley revisions, thereafter, permitted employers to file petitions when confronted with only one claim for recognition; the requirement that an employer be presented with such a claim prior to filing a petition was inserted, not as reasoned by the court below—to compel an employer to institute the representation process upon union demand, but solely to prevent employer from petitioning "on the first day that a union organizer distributed leaflets at the plant", i.e., to prevent abuse of the representation process.[17]

It is indeed difficult to justify the lower court's view of history that in 1947, Congress, by enacting Section 9(c)(1)(B), intended to further restrict employer—and for that matter employee—options to oppose unionization when the whole thrust of the amendatory legislation in this area confirms that Congress sought to give employers and employees greater options to oppose unionism, and provided the statutory means by which they could exercise those options.

Thus, Section 7 of the Act, the charter of employee rights, was amended to give employees "the right to refrain" from unionization. To Section 9(c)(1) was added the provisions

17. H. R. Rep. No. 245, 80th Cong. 1st Sess. 35 (1947); I Legislative History of the Labor Management Relations Act (I Leg. Hist.), at 326 (1948); S. Rep. No. 105, 80th Cong. 1st Sess. 10-11 (1947), I Leg. Hist. pp. 416-417.

not only to *permit* employer petitions, but also give employees, in the exercise of their "right to refrain", the means to decertify a union that they had become unhappy with. Section 8(b)(1)(A) was added, making it an unfair labor practice for a union to restrain or coerce employees in the exercise of their right to refrain. Section 8(c) was added in recognition of employers' First Amendment right to speak in opposition to unionization and convey his views to his employees.[18] And, in addition to the amendment of Section 9(c)(1) to permit employer petitions and employee decertification petitions, the representation process was further amended in various other respects to provide safeguards and standards which were lacking under the Wagner Act, the absence of which properly subjected the procedures developed by the Board to the Congressional criticism that the "Board has made collective bargaining 'a one way street.' "[19]

18. Under the Wagner Act, employers had no statutory right to speak against unionization and, under early Board decisions, employers were required to maintain strict impartiality with the result that any statements concerning unionism were held to be violative of employees' then Section 7 rights. *E.g., Schult Trailers, Inc.*, 28 NLRB 975 (1941); *Ford Motor Co.*, 23 NLRB 342 (1940); *Southern Colorado Power Co.*, 13 NLRB 699 (1939). Even after *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469 (1941), wherein this Court held that employers had a Constitutional right to express views that were noncoercive in nature, while the Board developed a less restrictive attitude toward speeches, it continued to otherwise restrict employer's free speech. *E.g., Clark Bros. Co.*, 70 NLRB 802 (1940); *Monumental Life Ins. Co.*, 69 NLRB 247 (1946). Congress found these decisions to be too restrictive and, consequently, enacted Section 8(c). See, S. Rep. No. 105, *supra*, at 23-24; I Leg. Hist., *supra*, at 429-430.

The effect of the rule urged by the lower court herein in rendering nugatory employers' free speech right and employees' right to a fully free and informed choice in the representation process, are explicated in subpart B of this section of the Chamber's brief.

19. S. Rep. No. 105, *supra*, at 10; I Leg. Hist., *supra*, at 416. Thus, Congress carefully amended Section 9(b) to place standards on the selection of bargaining units which it would permit the Board to certify. Section 9(c)(5) was added to reinforce Section 9(b) and to eliminate the Board's practice of basing its bargaining unit determinations on the extent of unions' ability to organize. Section

Simply, the Court of Appeals' interpretation of subsection 9(c)(1)(B) is at basic odds with the whole purpose behind the relevant 1947 revisions of the Act and, accordingly, should be rejected.

B. The Rule Suggested by the Lower Court Is Destructive of the Rights Conferred by Section 8(c) and the Policy of Informed Employee Choice.

Section 8(c), the "free speech" section of the Act,[20] is designed to permit employers the right to present their views concerning the disadvantages of unionism, and as this Court said in *Gissel*, it is a right which is "firmly established and cannot be infringed by a union or the Board."[21] Moreover, a salutary effect of the free speech rule, indeed a policy encouraged by the Board,[22] is an informed employee electorate which, when it makes its decision, has heard the views of both the union and employer and has had the opportunity to consider and reflect upon that decision. The rule suggested by the lower court

9(c)(3) was added to prevent unions which had lost elections from obtaining another election for a year; to preclude from voting employees who had been taken out on strike by a union and who had been permanently replaced; and to restructure the inequitable procedure in runoff elections which had prevented employees from having the opportunity to cast a negative vote in the runoff unless the "neither" vote had a plurality of votes case in the first election. S. Rep. No. 105, *supra*, at 24-25, I Leg. Hist., *supra*, at 430-431.

20. Section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

21. 395 U. S. at 615.

22. In explaining reasons for adopting the *Excelsior* rule which requires that both parties have access to employees during organizational drives, the Board stated:

> "The considerations that impel us to adopt the foregoing rule are these: The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone. In discharging that trust, we regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. *Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice." Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240 (1966). (Emphasis added).

herein[23] renders the employer's right of free speech nugatory and effectively vitiates the policy of encouraging "free and reasoned choice."

If the lower court's suggested rule were adopted, an employer would be required either to recognize the union or file a petition upon demand by the union. The reality of organizational campaigns is that a union does not make a demand for recognition until it is at the pinnacle of its strength. As is most often the case, nascent campaigns are conducted secretly, authorization cards are gathered hurriedly by fellow employees, and the employer is often not aware of the union's presence until authorization cards are gathered and a demand for recognition is made. Thus, the employees have only been exposed to the union's view and have not heard nor had time to consider the counterveiling view. This is true even if the union were to call a strike in support of the demand, and the picket line be honored, as acknowledged by the court below, because of fear or group pressure.

23. The Court of Appeals suggested that the Board adopt the following *per se* rule if it is to avoid inquiry into an employer's subjective state of knowledge:

> "The Board might, in order to reduce litigation and delay in these matters, adopt a rule that an employer must, when presented with an authorization card majority, either recognize the union, or within a reasonable time, petition for a certification election." *Linden, supra*, 84 LRRM at 2186, n. 47.

If an employer were required to recognize the union at that time, as the court suggests, his right to present his views is completely destroyed, and whether or not the employees really would have elected the union in the privacy of the voting booth had they been exposed to those arguments can never be ascertained.

The alternative to recognition suggested by the court below, an employer petition upon union demand for recognition, is no less destructive of these considerations. As the court below noted, an employer, as the Petitioner in a representation case would not be able to demand a representation hearing. The result would be a consent election which yields a quicker election than if the matter went to hearing.[24] An employer, unsophisticated in such matters and unfamiliar with union organizational campaign tactics and the nature of the appeals made to his employees, would have very little, if any, time to even learn what campaign issues the union had raised, much less the time to formulate an appropriate response so that his employees would have ample opportunity to give both views on all such issues studied consideration.

While the expeditious conclusion of representation cases resulting in an election and certification is certainly desirable, and dilatory tactics should be discouraged, such considerations are not sufficiently strong to vitiate the legitimate right contained in Section 8(c) and the policy of encouraging free and reasoned employee choice.[25]

24. See *Linden supra,* 84 LRRM at 2186, n. 48.

25. Moreover, the lower court's view that the desired expedition will necessarily result from the policy it advocates is tenuous at best. Thus, while the source cited by the court at footnote 48 of its opinion explains that a contested representation case is likely to take from sixty to sixty-three days between petition and balloting, and a consent election where the hearing is waived is likely to take twenty to twenty-three days, statistics reveal that an unfair labor practice proceeding required to establish the existence of a Section 8(a)(5) violation is likely to take much longer. In 1968, the year that *Wilder* was initially decided, the Board's records show that between January and June the median time between the filing of an unfair labor practice charge and a Board decision in a contested case was 388 days. *Gissel, supra,* at 611, n. 30. And, because of the ever increasing case load, the backlog of unfair labor practices has steadily increased each year since then. *Thirty-Seventh Annual Report of the National Labor Relations Board,* at 14, Chart 11 (1972). It can fairly be predicted that, under the rule suggested by the court below, employers will not file representation petitions, and unions, choosing not to file petitions themselves, will be required to establish their representative status in unfair labor practice proceedings. Accordingly, many, if not most representation matters that are now resolved by Board election will be resolved in lengthy unfair labor practice cases instead. Therefore, the operative effect of the rule advocated by the lower court, contrary to that court's view, will not contribute to expedition but will result in even greater delay. Moreover, as a further result of the lower court's suggested rule, representation matters will be determined in the unfair labor practice forum rather than through the representation election machinery that Congress so carefully designed for the proper resolution of such matters. Clearly, such results are contrary to the prompt and proper resolution of representation questions, and the decision below, which encourages those results, should be voided.

Certainly, the right to speak and the concommitant right to be informed are hollow rights unless their exercise to the fullest are guaranteed. The restriction placed upon their exercise is an infringement unwarranted by the counter considerations urged by the court below.

C. The Decision Below Is Contrary to the Policy Reflected in Section 8(b)(7)(C).

By its very language, Section 8(b)(7)(C) condemns recognitional picketing in lieu of resort to the representation process by making such conduct on the part of unions an unfair labor practice[26] enjoinable under the Act.[27] The lower court's inter-

26. Section 8(b)(7)(C) in relevant part provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining

(Continued on Next Page)

pretation of Section 9(c)(1)(B) yields a result that cannot logically be accommodated with Section 8(b)(7)(C) and encourages recognitional picketing contrary to the policy expressed therein.

Recognitional picketing is unlawful under Section 8(b)(7)(C) where such picketing has been conducted "without a reasonable period of time", not to exceed thirty days from the onset of the picketing. The language of Section 8(b)(7)(C) does not specify that either the union or the employer is required to file a petition; however, if the union fails to file one within a "reasonable" time, the proscriptions of 8(b)(7)(C) attach to the picketing, and in that sense, union—not employer—resort to the representation process is mandatory. The protection afforded employers by that Section thus turns on the *union's* timely resort to the Section procedures. If the union chooses not to use those procedures, the employer has the right to pursue its remedies under Sections 8(b)(7)(C) and 10(1). However, under the lower court's view, that employer petitions are obligatory whenever a union demands and pickets for recognition, the whole thrust of 8(b)(7)(C) is reversed; despite a union's inability to obtain sufficient support to permit it to file for an election or to file refusal to bargain charges, which would allow it to escape injunction of its picketing and a finding of a violation under Section 8(b)(7)(C), its conduct, nonetheless, would be exculpated from proscription, and injunctive relief could never be obtained; and, despite the fact that the union's conduct would result in the damage Section 8(b)(7)(C) seeks to prohibit, the protection afforded employers by that Section and Section 10(1) is rendered meaningless.

representative, unless such labor organization is currently certified as the representative of such employees:

* * *

(C) where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing."

27. See, Section 10(1).

Such a result encourages unions, as in the instant cases, to resort to organizational picketing and prolonged industrial disruption, contrary to the expressed mandate of Section 8(b)(7)(C). Accordingly, such a result should be rejected by this Court.

D. The Decision of the Court Below Impermissibly Restructures the Nature of the Representation Process.

By placing the burden of instituting the representation process on employers, the lower court restructures and alters the nature of that entire process. As the party demanding recognition, the burden of proving its entitlement to representative status in an appropriate unit is on the union. It always remains of the union. If an employer were required, as a matter of Board policy, to institute representation proceedings everytime a union claimed recognition, the union would be relieved of its burden of establishing a sufficient showing of interest to gain an election.[28] Additionally, as the Court below found, the employer would be required to designate the bargaining unit and "therefore would not be entitled, as an objecting party, to request a [representation] hearing."[29] The effect of this would permit the union to escape inquiry into the appropriateness of the unit, inclusions or exclusions of categories of employees within that unit, or other defects in the union's claim of representative status.

Aside from this impermissible shifting of burdens from the unions seeking representation to employers, the rule suggested by the Court of Appeals below leads to tactical misuse contrary to the nature and the purpose of the representation process.

28. A union petition filed under Section 9(c)(1)(A) requires that the petition be supported by 30% of the employees in the unit. An employer petition filed under Section 9(c)(1)(B) requires no such interest showing. National Labor Relations Board Statements of Procedure, 29 CFR Sec. 101.18(a).

29. *Linden, Supra,* 84 LRRM at 2186, n. 48.

Certainly, as indicated by the legislative history of Section 9 (c)(1)(B), the representation process is not a tool or lever which an employer can use to gain unfair advantage in order to defeat a union campaign. Equally, that process is not designed to afford unions similar tactical maneuverability. However, the decision of the court below permits unions to use the Board's procedures for such purpose.

A union, by demanding recognition, could at its option force an employer either to recognize it or file an employer petition *even if the union does not have majority support*. By setting up a picket line with a few loyalists, which is honored out of fear or respect, a union could force an employer either to recognize it, even though the majority of employees did not desire to be represented by that union, or to file a representation petition which the union would be unable validly to file, because the union did not have a sufficient showing of interest, or because its proposed unit was not appropriate, or because, as contended in the instant case, the union's interest was tainted by supervisory participation.

There are further tactical misuses inherent in the rule articulated by the court below. For example, the unions argued below that an employer who files a petition without actual doubt as to the union's majority status violates Section 8(a)(5) as much as he does when, for example, faced with a picket line, he refuses to recognize the union. The lower court felt that it need not determine this question.[30] Consideration of this union contention, however, necessarily reflects the untenable position in which that court's decision places employers. If a union which actually does possess majority support in a given unit were to demand recognition, and the employer, pursuant to the court's rule, files a petition asserting a different unit to be appropriate, or raising other unit issues, the resolution of which would be undesirable to the union, the union could thereupon file unfair labor practice charges and then take the position in an unfair

30. *Linden, supra,* 84 LRRM at 2186.

labor practice proceeding that the employer did not actually doubt the union's majority status with respect to unit selection; that the employer's petition was merely dilatory; and that the employer thereby violated Section 8(a)(5).[31] In this way, a union could circumvent the election procedure and still obtain a bargaining order. Equally, under the court's suggested rule, a bargaining order would lie where an employer does not file a petition but initially rejects the union's demand. The employer is thus faced with a Hobson's choice, placed in that position by a rule which permits such manipulation of the Board's processes.

Contrary to the view of the court below, the desired expedition and avoidance of protracted litigation would not result if the Board were required to implement the decision below. Certainly, restructuring the Board's representation process in a manner which dispenses with prerequisites for certification and which makes that process a lever for manipulation without a "clear cut" directive "in either the text of the statute or the legislative history" is destructive of that process and is too high a price to pay for the questionable returns that might result.

31. The union could prevail in its unit assertion since the Act speaks of *"a* unit appropriate" for collective bargaining purposes. In a given plant, store or factory, there may be more than one bargaining unit which the Board could find to be appropriate. For example, it is not uncommon to find drivers and warehousemen in a separate unit from production employees, nor is it uncommon to find them represented in the same unit. A unit need not be more appropriate or most appropriate, so long as it merely is "appropriate." Therefore, a union seeking to avoid an unfavorable unit determination upon the employer's petition could prevail since, under the Board's practice, disposition of a Section 8(a)(5) unfair labor practice case is required prior to resolution of a pending representation case. *National Labor Relations Board Field Manual,* "Concurrent R [representation] and C [unfair labor practice or "charge"] Cases, Section 11730-11730.4. Therefore, since the Board must make a unit determination necessary to the disposition of the unfair labor practice case, it must act first on the unit more favorable to the union's chances of winning at the polls, despite the fact that the unit sought by the employer in his petition, though less favorable to the union's chances of success, may be equally appropriate.

III.

THE INSTANT CASE CALLS UPON THE COURT TO FULLY SETTLE THE LAW IN THE AREA OF RECOGNITIONAL BARGAINING ORDERS AND REJECT THE REMAINING VESTIGE OF "GOOD FAITH DOUBT" AS AN OPERATING CRITERION.

The error of the lower court's view stems from its refusal to disengage itelf from that aspect of the "good faith doubt" test contained in the "independent knowledge" *Snow & Sons* doctrine and engage in the analysis mandated by *Gissel* which requires consideration of the causal effects of unfair labor practices on the election process "in terms of their past effect on election conditions and the likelihood of their recurrence in the future" and whether the "possibility of erasing the effects of past practices and of ensuring a fair election (or fair rerun) by the use of traditional remedies" exists. *Gissel, supra,* at 614. Moreover, study of post-*Gissel* Board decisions reveals that, except in the type case as is presented herein where there are no unfair labor practices which could possibly affect the holding of a fair election, i.e. the "fourth category", the Board has failed to engage in the required causal analysis and suggests that "good faith doubt" considerations still play a role in the Board's determination of whether a bargaining order is appropriate. If, as most participants in the area of labor relations agree, *Gissel* is to have any meaning in terms of finally settling a troubled and unsettled area of law, then this Court's *Gissel* command must be given full effect, direction must be brought to bear by the Court and the remaining vestige of "good faith doubt", as embodied in *Snow & Sons,* must be rejected.

The fact that the court below and the Board disagree as to the proper scope and application of *Snow & Sons,* and that it is this disagreement which gives rise to the instant cases, compels that this Court give consideration as to whether the doctrine of independent knowledge has any continuing validity since employer knowledge or lack of knowledge of a union's majority

status has no relationship to the causal effects of employer conduct on probability of holding a fair election.[32] Since "[S]ecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support,"[33] *Gissel* commands that the Board conduct an election unless pervasive unfair labor practices make a fair election improbable. The fact that an employer, a layman who would have no knowledge of the Board's *Snow & Sons* rule or, perhaps, the existence of the election process, might succumb to a union's pressure to agree to a card check and later changes his mind, does not, by such an act alone, engage in conduct that frustrates the antiseptic conditions necessary to a free election.[34] *Snow &*

32. Thus, while the *Gissel* Court, in reviewing the evolution of the "good faith" doctrine, understood *Snow & Sons* to represent that type of case where "the employer had come forward with no reasons for entertaining any doubt [as to the union's majority status] and therefore that he must have rejected the bargaining demand in bad faith," the Court clearly stated its further understanding that in *John P. Serpa, Inc., supra,* "the Board had limited *Snow & Sons* to its facts." *Gissel, supra,* at 594-595. It is clear, however, that in tracing the history of the "good doubt" doctrine, the Court did not evaluate *Snow & Sons* in *Gissel.* However, in light of *Gissel,* that evaluation is compelled herein.

33. *Gissel, supra,* at 602.

34. In this regard, Professor Lesnick has commented:

> "If an employer is to be permitted, first, to insist on an election, and then to campaign against the union in that election, it is perfectly clear that he is being permitted to reject the collective bargaining principle so long as his employees do not, by voting for the union, oblige him to accept it.
>
> * * *
>
> The Board has explicitly declined to rely on lawful antiunion conduct as a ground for inferring that an initial refusal to recognize was unlawful. But the taking of this step, unless no more than obeisance to the language of section 8(c), implies that a legitimate purpose of the election is not simply to ascertain the validity of the union's initial claim to represent a majority, but also to test the durability of that majority in the crucible of a pre-election campaign. Once that fact is acknowleged, it seems obvious that it is entirely irrelevant to the legitimacy of the employer's conduct whether the union initially commanded a majority, which it hoped to hold through a campaign, or began with something less than fifty percent support, which it hoped to augment." Lesnick, *Establishment of Bargaining Rights Without an NLRB Election,* 65 Mich. L. Rev. 851, 858-9 (1967).

Sons is thus simply an anachronism that is no longer viable in light of the directive of *Gissel*.[35]

The circumstances of *Snow*, which was decided during the *Joy Silk*[36] "good faith doubt" era, themselves are illustrative. There the Board's Trial Examiner found that the first time the employer had any inkling of labor unrest was when the union's representative visited him and demanded recognition; that he agreed to the authorization card check because he had felt pressured by circumstances and merely wanted to ascertain the degree of unrest; and that he repudiated the card check solely because he preferred that his employees express their choice in a Board election.[37] The Trial Examiner expressly found that the employer's repudiation of the card check was not motivated by its desire to gain time to unlawfully dissipate the union's majority, distinguishing the cases relied on by the General Counsel because in those cases, the employers' repudiations *were accompanied by extensive unfair labor practices.*[38] Accordingly, the Trial Examiner found no violation of Section 8(a)(5).

The Board did not disagree with the Trial Examiner's findings, but found a violation, nonetheless, simply because the employer

35. As the Board freely acknowledges, the purpose of retaining the *Snow & Sons* doctrine is to "encourage the parties to adhere to their voluntary agreements." Board's petition for Writ of Certiorari herein, at 15, n. 18. It appears to the *Amicus* that the enforcement of such "quasi-contractual" obligations between unions and employers is not a proper consideration for the Board in determining the propriety of a bargaining order when the purpose of the Act is the enforcement of *employee* rights, which are better protected through the statutory election process when that process may be fairly utilized.

36. *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1940), enf'd., 185 F. 2d 732 (CA DC, 1950) *cert. denied*, 341 U. S. 914 (1951), articulated the good faith doubt test that was "virtually abandoned" even before *Gissel*. See, *e.g.*,: *Benson Wholesale Co., Inc.*, 164 NLRB 536 (1967) *Taitel & Son*, 119 NLRB 910 (1957). Moreover, even prior to *Gissel*, unfair labor practices too insubstantial to warrant an inference of lack of good faith doubt in rejecting a union's recognition demand were held not to support bargaining orders. *Hammon & Irving, Inc.*, 157 NLRB 1071 (1965); *Hercules Packing Corp.*, 163 NLRB 264, *affirmed*, 386 F. 2d 790 (CA 2, 1967).

37. *Snow & Sons, supra*, at 718-721.

38. *Id.*, at 720.

"had no reasonable doubt as to the union's majority status."[39] Thus, the Board's so-called independent knowledge test is grounded in and constitutes a backtracking into the area of subjective inquiry that is no longer valid in light of the "Gestalt" of *Gissel*.[40]

Further, except in "type four" cases it is clearly evident that the Board has not followed through on the *Gissel* command to weigh the effects of employer practices in determing whether a bargaining order is necessary to remedy the effects of those practices. Surveys of post-*Gissel* cases conducted by the legal scholars confirm this analysis,[41] and various cases that have reached the Court of Appeals suggest that the Board has not really abandoned the good faith concept and, instead of engaging in the mandatory causal analysis, has merely substituted the "talismanic words or ritual phrases" of *Joy Silk* with the "magic words" contained in the *Gissel* opinion. *N. L. R. B.* v. *Gibson Products Co.*, ____ F. 2d ____ 86 LRRM 2636, 2641 (CA 5, May 31, 1974). Analysis of the Board's treatment of two comparable cases, *Gibson, supra*, and *General Steel Products*, one of the original *Gissel* cases, on second remand, 199 NLRB No. 121 (1972), are illustrative.

39. *Id.*, at 710.

40. See, A. S. and T. G. S. Christensen, *Gissel Packing and Good Faith Doubt: The Gestalt of Required Recognition of Unions Under the NLRA*, 37 U. Chi. L. Rev. 411 (1970), wherein the authors, borrowing from the concept of Gestalt psychology, forcefully make the argument that *Gissel* represents a configuration or integrated pattern of all that went before in which subjective inquiry plays no role.

41. See, *e.g.*,: A. S. and T. G. S. Christensen, *supra;* and G. Carson, *The Gissel Doctrine: When a Bargaining Order Will Issue*, 41 Fordham L. Rev. 85, 97 (1972) wherein the author concludes:

> "[I]n every case [remanded for reconsideration in light of *Gissel*], the Board appears to have merely rephrased its opinion, replacing the *Joy Silk* language with *Gissel* language.
>
> In reaffirming the initial bargaining order, the Board would reiterate its former unfair labor practice findings and couch its decision in one or more of the following *Gissel* phrases: Traditional remedies could not ensure a fair rerun; unfair labor practices establish the likelihood of their recurrence; a fair election rerun is unlikely; or the unfair labor practices were so coercive and pervasive as to destroy utterly the conditions necessary for a free election." (Footnotes omitted).

Upon remand from this Court, the Board, in its first supplemental decision concluded that *General Steel* was a Category I case, without re-opening the proceeding, and reaffirmed its pre-*Gissel* bargaining order.[42] When the case again went to the Fourth Circuit, that court criticized the Board's "apparent unwillingness" to seriously consider the questions raised by *Gissel*, and remanded the case to the Board to require inquiry into whether a fair election was probable.[43] On second remand, the Board's Administrative Law Judge Harold X. Summers carefully engaged in the analysis mandated by *Gissel* and concluded that a fair election could be held, and the Board affirmed. 199 NLRB No. 121 (1972).[44]

At virtually the same time, however, that the Board affirmed Judge Summers' analysis in *General Steel*, it issued its second supplemental decision in *Gibson Products, supra*, 199 NLRB 115 (1972). There, the Board mechanically applied the *Gissel* language and, contrary to its *General Steel* decision concluded that *Gibson* was a Category I case, despite its earlier finding that the unfair labor practices involved placed the case within Category II.[45]. When the case went back to the Fifth Circuit on the second petition for enforcement, that Court took the Board to task for its failure to adhere to the teachings and purpose of *Gissel*, and, rather than remand the case where the Board had had opportunity to engage in the *Gissel* analysis but failed twice to do so, simply followed the *Gissel* directive itself and concluded that because of their minimal effect on the election process, the unfair labor practices fell into Category III and did not warrant a bargaining order. Moreover, the Fourth and Fifth Circuits are not alone in recognizing that the Board

42. 180 NLRB 56 (1969).

43. 445 F. 2d 1350 (1971).

44. Administrative Law Judge Summers' opinion contains an excellent analysis of the mandate in *Gissel* and application of the *Gissel* criteria to the facts of that case. See ALJD, 199 NLRB No. 121, *supra*, slip opinion at 1-22.

45. See, *Gibson, supra*, 86 LRRM at 2636-41.

apparently has yet to free itself from the *pre-Gissel* rationale and analyze recognition cases according to the *Gissel* directive. Where the Board has failed to follow the *Gissel* command, Courts of Appeals have refused to enforce Board bargaining orders.[46] It would therefore appear that the Board (except in cases precisely like those involved herein) and the court below are among the few, if any, who are not committed to this Court's *Gissel* rationale, propelled into their positions because of the remaining vestige of "good faith doubt" embodied in *Snow & Sons*. If *Gissel* is not to be rendered devoid of meaning, then direction in the analysis command therein must be given by this Court.

Were the casual analysis mandated by *Gissel* undertaken in the *Snow & Sons* situation, it is transparent that no bargaining order remedy would be awarded. That is, an employer's revocation of his promise to agree to a card check, absent any unlawful or coercive conduct, has no effect whatsoever on the laboratory conditions which are conducive of a fair election, and a bargaining order is, therefore, *under Gissel*, not an appropriate remedy. Accordingly, the remaining vestige of good faith doubt contained in the *Snow & Sons* doctrine should be rejected by this Court.

46. See, *e.g.*,: *Peerless of America* v. *N. L. R. B.*, 480 F. 2d 940 (CA 7, 1973); *N. L. R. B.* v. *Kostel Corp.*, 440 F. 2d 347 (CA 7, 1971); *Arbie Mineral Feed Co.* v. *N. L. R. B.*, 438 F. 2d 940 (CA 8, 1971); *Harper & Row Publishers, Inc.* v. *N. L. R. B.*, 476 F. 2d 430 (CA 8, 1973); *N. L. R. B.* v. *General Stencils, Inc.*, 438 F. 2d 894 (CA 2, 1971) *enf'ment. denied following remand*, 472 F. 2d 170 (CA 2, 1972); *Automated Business Systems* v. *N. L. R. B.*, ... F. 2d ....., 86 LRRM 2659 (CA 6, May, 1974).

CONCLUSION.

For the foregoing reasons, and those urged by the Petitioners National Labor Relations Board and Linden Lumber Division, Summer & Co., the Chamber respectfully prays that the decision of the Court of Appeals be reversed. In so doing, the Court should reaffirm its *Gissel* directive by directing that the causal analysis mandated therein be carried out and, as a necessary corollary, reject the doctrine of *Snow & Sons.*

Respectfully submitted,

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No 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER LINDEN LUMBER DIVISION, SUMMER & CO.

I.

INTRODUCTORY STATEMENT

In order to resolve the question left unanswered by *N. L. R. B.* v. *Gissel Packing Company*, 395 U. S. 575, 595 and n. 18 (1969), *viz.*, "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes," three separate positions have been presented to this Court. The first, that adopted by the Board pursuant to its expertise and

broad discretion in administering the Labor Act (*Gissel*, 395 U. S. at n. 32; *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344 (1953)), and advanced here by both the Board and Linden, is that, unless an employer has voluntarily agreed to resolve a union's claim of majority by another permissible means, he may lawfully insist that the union's status be determined by an election—that, in these circumstances, a bargaining order would never be appropriate. The second contention, the view of the court below, is that a bargaining order would be an appropriate remedy in such a case where the employer fails to affirmatively "evidence good faith" and resolve the union's majority claim, if voluntary recognition is declined, by filing an immediate election petition under Section 9(c)(1)(B) of the Act. Linden pet., p. A23. Finally, the Respondent Unions have argued a third distinct position: that a bargaining order is appropriate in every instance where an employer declines to recognize a union that has presented "convincing evidence of majority support" and that, unless the employer has reasonable grounds for doubting such evidence, he cannot "escape this obligation" by filing a election petition. Union's br., pp. 18, 45.

Linden's principal brief (pp. 13-21) demonstrated that the Court of Appeals' view, apart from other deficiencies, substantially distorts Section 9(c)(1)(B) which permits, but does not require, an employer to file an election petition and also reinstates an "inquiry into the employer's subjective state of mind . . . [and] thus conflicts with *Gissel's* implicit approval of the Board's abandonment of good faith as a standard for defining the duty to bargain."[1] The position of the Respondent Unions is similarly defective. It is predicated on three fundamental misconceptions: (1) that, since "prompt initiation of bargaining is the Act's overriding aim," any policy which would impede prompt employer recognition of a labor organization, as, for example, a counter-campaign lawfully stressing the disadvantages of unionization or the imposition of tactical difficulties in the union's organizational path, is forbidden (see, e.g., Unions' br. at pp. 12, 21, 38-42); (2) that the "election procedure is not qualitatively superior to all the available possibilities" (Unions' br., p. 35); and (3) that, in any event, the issue presented in this case is one that already has been decided by Congress which has "squarely answered that question so as to preclude adoption of the Board's . . . position" (Unions' br., p. 5). None of these arguments, as shown below, have merit.

1. Note, *Union Authorization Cards: Linden's Peacemaking Potential*, 83 Yale L. J. 1689, 1697 (1974).

II.

ARGUMENT

A. The crux of the Unions' position is the belief that "the ultimate aim of the Act . . . is to 'encourage the practice and procedure of collective bargaining.' " Unions' br., p. 12.[2] Such a view can, of course, readily be invoked against any limitation on a union's ability to obtain recognition. If the election process is more time-consuming than requiring recognition based on authorization cards or other secondary idicia of employee sentiment, as it minimally is;[3] or if employees frequently reject

2. There is considerable doubt whether, even if the sole objective of the Act was to encourage collective bargaining, the Unions' position would facilitate achievement of that goal. As Professor Bok has observed, if bargaining orders were limited to cases "involving serious violations" and "in which there is a reasonable probability that the union would have ultimately prevailed in the absence of the employer's unlawful acts," there would be "greater assurance that [the] order would be followed by effective bargaining." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the NLRA*, 78 Harv. L. Rev. 38, 138 (1964). Moreover, to the extent that union coercion or misrepresentation arises in a refusal to bargain proceeding involving authorization cards, the Unions' argument would further discourage bargaining; the card process "delays recognition and bargaining for it contains a built-in bias toward protracted litigation, and fails to protect employee free choice against union coercion as well as an election does." Note, *supra* n. 1, at 1700-1701.

3. In fiscal year 1973, in contested elections where there was a pre-election hearing, the median time between the filing of a

unionization once they become aware of its disadvantages, as also appears to be the case;[4] or if it is time-consuming to permit employers to obtain court review of Board representation case decisions, as is occasionally sought,[5] then in each instance the

petition and the direction of an election was 42 days. *Thirty-Eighth Annual Report of the National Labor Relations Board*, 13 (1973). In stipulated or consent elections, where a pre-election hearing is waived, the elapsed time from the petition filing to the direction of election is usually three to five days and, in either case, an election is then held from 17 to 20 days thereafter. Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The "Independent Knowledge" Standard*, 39 U. Chi. L. Rev. 314, 325 n. 48 (1972). It is the latter consent route, which does not entail any litigation whatsoever, which is that followed in *over eighty per cent* of the total elections. *Thirty-Eighth Annual Report*, 16. There are many considerations which dictate the consent route—the possibility of "consumer picketing, threats of labor trouble or excessive grievances in affiliated plants, pressure exerted by customers friendly to the Union" (Bok, *supra* n. 2, at 54); the absence of contested issues; the desire to avoid litigation and/or campaign costs; the expectation of a more advantageous collective bargaining agreement; or a general objective of reducing employee discontent and improving production. And, for the same reasons, contrary to the Unions' assumption (pp. 39-42), any post-election proceedings, let alone "protracted litigation," are highly unusual. See note 5, *infra*.

4. See *e.g.*, Doppelt and Ladd, *Gissel Packing Company—The N. L. R. B.* v. *Applies the Standard*, 49 Chi.-Kent L. Rev. 161, 177 (1972) ("It is not all uncommon that a large number of employees sign cards for a union, and then vote against the union after intensive pre-election employer campaigning"); and the other authorities noted at p. 10, n. 11 of Linden's principal brief. Among the reasons for this change of position is the fact that an employee, when he signs an authorization card, "may know very little about the possible disadvantages of unionism, such as initiation fees and special assessments, fines for the violation of union rules, and obligations to walk the picket line in any strike involving the union." Comment, *Refusal-To-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. Chi. L. Rev. 387, 390 (1966).

5. The Unions' attack on the right of employers to appeal representation case issues through the unfair labor practice route to the appellate courts, and the asserted need to eliminate the delay occasioned thereby through either required recognition or a consent election procedure (Unions' br., p. 8, n. 8 and pp. 38-42), disregards, *first*, that Congress mandated precisely such an indirect, time-consuming method of review. See *e.g.*, *Boire* v. *Greyhound Corp.*,

necessity of "encourag[ing] collective bargaining" is raised as a touchstone to nullify such a practice. See Union's br., pp. 12, 19-21, 38-42. The Act is thus viewed as having a single myopic goal: the promotion of unionization.

Whatever the merits of this view under the Wagner Act, either as the singular objective of national labor policy[6] or as the justification for card-based bargaining orders,[7] the Taft-Hartley

376 U. S. 473, 477-78 (1964): ("That this indirect method of obtaining judicial review imposes significant delays upon attempts to challenge the validity of Board orders in certification proceedings is obvious. But it is equally obvious that Congress intended to impose precisely such delays.") *Second*, notwithstanding the availability of this review procedure, it is utilized only infrequently. Employers virtually universally abide by the results of the Board's election processes. Objections are filed in only nine per cent of the cases (*Thirty-Eighth Annual Report*, *supra* n. 3, 277) and further appellate litigation is relatively rare. Of 8,526 representation elections resulting in the certification of a union during fiscal year 1973, judicial orders requiring the commencement of bargaining were issued during the same period in only 147 cases or 1.7 per cent of the elections held. *Id.* at 210, 225. Professor Ross, after a comprehensive study of refusal-to-bargain cases during a five-year period, similarly found that "the overwhelming majority of employers do not violate Section 8(a)(5) . . . *If all employers who delayed compliance until after the entry of a contested court decree eventually signed contracts, there would only have been 47 new bargaining relationships for the five year period.*" Ross, *Analysis of Administrative Process under Taft-Hartley*, 1966 Labor Relations Yearbook, pp. 259, 309-310 (BNA, 1966) (emphasis added).

6. See, *e.g.*, *International Assn. of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 82 (1940), commenting that the Board, in order to dissipate union unfair labor practices, may exercise "discretion involving an expert judgment as to ways and means of protecting *the freedom of choice* guaranteed to the employees of the Act . . . unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have *the complete freedom of choice which the Act contemplates*" (emphasis added).

7. See, *e.g.*, *Franks Bros. Company* v. *N. L. R. B.*, 321 U. S. 702, 704-705 (1944), where this Court upheld a bargaining order since, *inter alia*, to do otherwise would allow employers "to profit from their own wrongful refusal to bargain." See, to the same effect, *Gissel*, 395 U. S. at 610-11. If, as *Franks Bros.* suggests, "the prime value of the remedy resides in its deterrent effect, there is little reason to apply it to conduct that is merely inadvertent. As a general rule,

amendments to the Act "exemplified and encouraged the opposing view."[8] The original concern of the Act, "the lack of effective unions", was altered in 1947 so that "the individual's freedom to refrain from collective action became a dominant theme . . . it is sometimes said that the policy of the statute is no longer to encourage collective bargaining but to protect employees in their freedom of choice as to whether they shall have collective bargaining . . . The central focus [of the Taft-Hartley amendments] was protecting employees' freedom of choice; whether they chose collective bargaining was of little concern".[9] Similarly, the 1959 Landrum-Griffin amendments to the Act imposed "no added commitment to collective bargaining as an instrument of democratic government. On the contrary, those amendments reinforced freedom of choice . . . The dominant attitude of the law and society toward collective bargaining seems to be one

therefore, the order to bargain might well be restricted to cases involving discriminatory discharges or clear threats of retaliation." Bok, *supra*, n. 2, at 138.

8. Cox, *Some Current Problems in Labor Law: An Appraisal*, 35 LRRM, 48, 50 (BNA, 1954) which, in addition to the arguments adduced in support of the various new provisions added to the Act, also notes "the violence of the Taft-Hartley debates [which] seems attributable to labor's understanding of the destructive philosophy [being] introduced into the [Act]" and "the insistence upon repeal [of the amendments which] can be explained . . . by the feeling that only repeal would repudiate the misconception."

9. Summers, *Freedom of Association and Compulsory Unionization in Sweden and The United States: A Comparative Study*, 112 U. Pa. L. Rev. 647, 665-67, 694-95 (1964). Summers observes, for example, the addition of the right of employees to refrain from concerted activities; of employees to decertify unions and revert to individual bargaining; of the increased employee freedom under section 9(a) to process and adjust grievances; and of the new restrictions imposed on secondary boycotts which "curtained the unions' use of economic pressure to achieve representation status." In addition, there was also the elimination of means other than an election to obtain the benefits of certification, the inclusion of the right of employers to file election petitions, the addition of section 8(c) to guarantee employers the right to express their view on unionization and the insertion of section 8(b)(1)(A) to forbid coercive union tactics. See Linden principal br., p. 9.

of neutrality, if not indifference."[10] Indeed, as this Court recently observed in *N. L. R. B.* v. *Savair Manufacturing Co.*, 414 U. S. 270, 94 S. Ct. 495, 499 (1973), "The Act is wholly neutral when it comes to that basic choice."

This desire to encourage freedom of choice has also influenced the post-1947 evolution of bargaining orders. The Board, for example, "has *never* held that presentation of cards from a majority of members of the unit created an absolute duty to bargain."[11] No Board member has ever "suggested going this far since the enactment of the Taft-Hartley amendments in 1947"[12], and an examination of Board card-based bargaining orders for 1965-1968 disclosed *no* instance where a bargaining order issued and there was neither "interference with the election process" or "the rejection of previously agreed upon means to determine the union's majority status".[13] The Unions' view has also been repeatedly rejected by the Board: in *Aaron Brothers*, 158 NLRB 1077 (1966), where the Board emphasized "that an employer no longer needed to come forward with reasons for rejecting a bargaining demand" (*Gissel*, 395 U. S. at 593); in *Gissel*, where the Board reiterated that "an employer can insist that a union go to an election . . . so long as he is not guilty of misconduct . . . he can demand an election with a simple 'no comment' to the union" (*Id.* at 594); and in the recent

10. Summers, *supra* n. 9, at 667, 695, observing that the Landrum-Griffin amendments not only tightened "restrictions on secondary boycotts, but also blunted another economic weapon used by unions to obtain recognitional status—so-called organizational picketing." Significantly, while Section 8(b)(7), added by the Landrum-Griffin amendments, confers upon an employer the option to withstand coercive union picketing and not petition for an election, the lower court's decision totally abrogates that right.

11. Comment, *supra*, n. 3, at 318 (emphasis added), citing the Memorandum from Sec. of Labor Wirtz to Sen. Javits, in *Hearings on S.256 Before the Senate Comm. on Labor and Public Welfare*, 89th Cong., 1st Sess., 19, 20 (1965).

12. Welles, *The Obligation to Bargain On The Basis of A Card Majority*, 3 Ga. L. Rev. 349, 351 (1969).

13. Gordon, *Union Authorization Cards and the Duty to Bargain*, 19 Lab. L. J. 201, 222 (1968).

Steel Fab, 212 NLRB No. 25, 86 LRRM 1474, 1478 (1974), decision which once more declared that "the bargaining order . . . is designed solely as a remedy for serious employer interference with employee rights". As these authorities demonstrate, a remedial bargaining order is not designed to issue absent employer wrongdoing; and refusal to accept secondary indicia of majority support is simply not wrongdoing sufficient to shift the Unions' traditional burden of proving majority support. Obviously, the Unions are not pleased with this post-1947 direction of the Act and seek, by means of this case, to restructure the course of national labor policy. Their forum is, however, misplaced. "[t]his Court is not a super Board authorized to overrule an agency's choice between reasonable constructions of the controlling statute" (*Florida Light and Power Co.* v. *I. B. E. W.*, ___ U. S. ___, 94 S. Ct. 2737, 2750 (1974) (dissenting opinion)).

B. The Unions argue that, notwithstanding Congressional recognition of "the acknowledged superiority of the election process" (*Gissel*, 395 U. S. at 602), that "the election procedure is not qualifiedly superior to all the available possibilities". Unions' br., pp. 34-38. Other knowledgeable observers have repeatedly reached a sharply-different conclusion: for example, that "[i]t cannot be gainsaid that the best and most reliable method of determining the representative status of a union is the election process. . . . The Board has lived by that precept . . .";[14] that "[a]vailable statistics support the hypothesis that card checks are not as reliable a method of determining union support as are Board elections . . . the Board itself has expressed awareness of the shortcomings of card check determination . . . Expressions of doubt as to the reliability of the card check process have also come from . . . Secretary of Labor Willard Wirtz and even the AFL-CIO";[15] and that "[i]t would

14. Former Board Associate General Counsel Gordon in *id.* at 223.

15. Comment, *supra* n. 4, at 390-92 (footnotes omitted), citing former Board Chairman McCulloch's study in Section of Labor Relations Law American Bar Association, 1962 Proceedings, 17;

be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check' . . . No thoughtful person has attributed reliability to such card checks."[16]

An employer is not, of course, precluded from relying on authorization cards to voluntarily grant recognition, and cards may also be utilized where, because of employer misconduct, they constitute the only available means of determining employee sentiment.[17] The value of secondary authorization indicia in such instances does not, however, warrant abandoning the principle of free choice and incurring the risk of imposing a bargaining agent upon what may actually be a nonconsenting majority[18] in other situations. Cards are, to repeat, frequently obtained

Midwest Piping & Supply Co., 63 NLRB 1060, 1070, n. 13 (1945); Wirtz, *supra* n. 11, 19 (1965); and the AFL-CIO 1961 Guide Book for Union Organizers.

16. *N. L. R. B.* v. *S. S. Logan Packing Company*, 386 F. 2d 562, 656 (4th Cir. 1967); and see this Court's recently articulated concern about the fate of employees who refuse to sign authorization cards, in *N. L. R. B.* v. *Savair Manufacturing Co., supra*, 94 S. Ct. at 501.

17. The Unions' reliance (pp. 35-6) on *Sullivan Electric Co.*, 199 NLRB No. 97, 81 LRRM 1313, enf'd 479 F. 2d 1270 (6th Cir. 1973), is misplaced. That case dealt with an entirely different situation not present here—an employer "unilaterally undertak[ing] to determine the Unions' majority or minority status by means of a poll, under conditions of his own choosing" (81 LRRM at 1314). In addition the Sixth Circuit expressly upheld the Board's view in the instant case as "consistent with the leading case law established in *N. L. R. B.* v. *Gissel* . . ." 479 F. 2d at 1272. Linden submits, moreover, that, although not before the Court in this case, the decision in *Sullivan Electric* and similar resurrections of a good faith doubt approach should be rejected since *Gissel* repudiated such an inquiry into an employer's subjective motivation. 395 U. S. at 594; see also Linden's principal brief at 14-16 and n. 16 and the brief *amicus curiae* of The Chamber of Commerce of the United States.

18. Cf., *e.g.*, *International Ladies' Garment Workers* v. *N. L. R. B.*, 366 U. S. 731, 737 (1961) ("there can be no clearer abridgement of Section 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain' from such activity" than to grant "exclusive bargaining status to an agency selected by a minority of employees, thereby impressing that agency on the nonconsenting majority").

under such conditions,[19] and without knowledge of other considerations,[20] so as to render them an unreliable means of ascertaining employee choice and, as already demonstrated (see note 4, *supra*), are a misleading indicator of employee desires.

C. Although the court below found "no clear cut answer . . . either in the text of the statute or the legislative history . . . to the question of when and in what circumstances an employer must take evidence of majority support as convincing" (Linden pet., p. A14), the Unions argue that Congress has "squarely answered" the question here presented "so as to preclude adoption of the Board's . . . position." The instant case, they assert, is thus analogous to *N. L. R. B.* v. *Drivers Local Union No. 639 (Curtis Bros.)*, 362 U. S. 274 (1960), where, by reason of Section 13 of the Act forbidding any restrictions on the right to strike as it existed prior to 1947 unless "specifically provided for" in the Act itself, this Court refused to permit the Board to adopt a restriction that was, unlike the present situation, inconsistent with both pre-1947 decisions and the Board's own interpretations of the law for nearly a decade after the adoption of the Taft-Hartley amendments. Unions' br., pp. 5, 21-24.

Such persuasive Congressional history, sufficient to both negate the repeated indications of a contrary legislative pur-

19. See, *e.g.*, Note, *supra* n. 1, at 1698 (". . . the card drive may acquire a bandwagon effect more readily than an election. There is a danger of threats or promises from the solicitor . . . Physical threats may also be present. The potential for misrepresentation is great . . ."), and Comment, 75 Yale L. J. 806, 825 (1966).

20. Regardless of whether the addition of Section 8(c) to the Act in 1947 is viewed as "merely a rule of evidence" (Unions' br. pp. 19-20), or a broader guaranty to employers of the right to express their views on unionization and thereby create a more informed electorate, this provision clearly militates against the Unions' position. To adopt that view would result "in the anomalous position of denying elections requested by employers on the grounds that the employers desired to engage in action specifically authorized by the statute". Comment, *supra* n. 4, 400, n. 65.

pose (see n. 9, *supra*) and equivalent to the express prohibition of Section 13, is assertedly found in the Congressional conferees refusal to adopt a proposed House amendment which would have required employer recognition of certified unions only. As *Gissel* demonstrates (395 U. S. at 598-600), however, the import of this history and this Court's subsequent decision in *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U. S. 62 (1956),[21] was to permit the continued use of cards for either purposes of voluntary recognition or to support a bargaining order under *Franks Bros.*, 321 U. S. 702 (1944), where employer misconduct precluded a fair election. Indeed, acceptance of the House amendment would have forbidden either of these two routes to recognition. It is a wholly different proposition to urge, conversely, that Congress intended to compel employer recognition on the basis of cards or other secondary indicia of employee support, particularly in view of the frequent expressions of a contrary legislative desire to promote employee free choice.[22]

21. *Mine Workers* did not involve, nor has it ever been read to control, as the Unions propose (br., pp. 25-8), the present situation. That case did not concern or even discuss an employer's obligation to bargain absent the commission of unfair labor practices. Rather, it dealt with a wholly different matter—the right of a state court to enjoin recognitional picketing by an admitted unit majority after submission of that majority's cards to the employer.

22. In addition, the conferees may have "felt the thorough revision of Section 9(c) obviated any need to change Section 8(a)(5). The House Minority Report suggests that the main concern with Section 8(a)(5) was related to the subject of bargaining as distinct from recognition. H. R. Rep. No. 245 at 82". Comment, *supra* n. 19, at 820, n. 103.

III.

CONCLUSION

For the foregoing reasons, as well as those stated in Linden's principal brief, it is respectfully prayed that the decision of the Court of Appeals be reversed and this case be remanded to that Court with instructions to enforce the Board's order in its entirety.

Respectfully submitted,

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